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CHARLES ELMORE CROPL
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In the

Supreme Court of the United States

OCTOBER TERM, 1950

No. [redacted] 78

MARIANNA von MOLTKE,
Petitioner,
vs.
A. BLAKE GILLIES,
Superintendent of the Detroit House of Correction,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

MARIANNA von MOLTKE,
Petitioner,
11142 Kercheval Avenue,
Detroit 14, Michigan.

Interstate Brief & Record Co., 642 Brooklyn St., Detroit 26, Michigan

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

PRELIMINARY STATEMENT

Petitioner is without funds to employ counsel, and has, therefore, prepared this petition with the aid of friends and files it in her own behalf. Because of unfamiliarity with legal procedure, it is undoubtedly full of legal errors, but is the best that can be prepared without professional assistance and advice. The form of the petition is adapted from the prior petition filed by this petitioner in the above cause which was heretofore passed on by this Court in the case of *von Moltke v. Gillies,* ultimately decided on January 19, 1948, as Case No. 73 in the October Term of 1947.

II.

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED

This is a habeas corpus proceeding in which petitioner alleges that she was unlawfully and unjustly sentenced and imprisoned in the custody of respondent on petitioner's plea of guilty to a charge of Conspiracy to violate Section 2 of the Espionage Act of 1917. She claims her sentence and imprisonment are in violation of Amendments V and VI of the Constitution in that

(a) she did not understand nor was she advised of her right to counsel, and

(b) she was denied due process of law in that she was coerced and deceived into pleading guilty, and

(c) she relied upon advice given by an agent of the Federal Bureau of Investigation, the agency charged with the presentation of the case against her.

This cause was decided on a prior appeal to this Court on January 19, 1948, being Case No. 73, October Term of 1947, wherein four Justices voted for reversal of the judgment of the Circuit Court of Appeals and to set aside the prior judgment of the District Court and direct the District Court to grant the petitioner's prayer for release from further imprisonment under the judgment based on her plea of guilty. Three Justices voted for affirming the judgment of the Circuit Court of Appeals. Two Justices voted for reversal but also that the District Court should further consider and make explicit findings on the questions of fact raised in the first appeal.

The facts, being familiar to the Court, are not again recited.

The hearing before the District Court on this Court's prior opinion has been concluded and the Writ of Habeas Corpus denied in an unreported opinion. The Circuit Court of Appeals has affirmed the District Court's action in an opinion dated April 6, 1951, Circuit Judge McAllister dissenting.

III.

BASIS OF JURISDICTION

Jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended, being Section 347 (a), Title 28, U. S. C. A.

IV.

QUESTIONS PRESENTED

1. Under the evidence and proofs in the District Court, did petitioner as a matter of law and fact voluntarily, competently and understandingly waive her right to have the

assistance of counsel in her defense as guaranteed by the VIth Amendment?

2. Did the Court of Appeals err in holding that petitioner had voluntarily, competently and understandingly waived her right to assistance of counsel in her defense?

3. Under the undisputed evidence and proofs in this case, was not petitioner coerced, intimidated and deceived into pleading guilty and waiving her right to the assistance of counsel by agents of the Federal Bureau of Investigation and thus deprived of her liberty without due process of law contrary to the provisions of the Vth Amendment?

4. Do the evidence and proofs in this case show compliance by the Government with the requirements of the Vth and VIth Amendments and observance of petitioner's Constitutional rights under said Amendments in connection with her conviction and sentence?

5. Did the Circuit Court of Appeals err in affirming the judgment of the District Court under the undisputed facts in this case?

V.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The Circuit Court of Appeals has decided important questions of federal law in this case: to-wit, question involving civil liberties arising under the Vth and VIth Amendments to the Constitution which have not been, but should be, settled by this Court.

2. The Circuit Court of Appeals has decided federal questions arising under the Vth and VIth Amendments to the Constitution in a way probably in conflict with applicable decisions of this Court. *Hawk v. Olson*, 326 U. S. 271;

Glasser v. United States, 315 U. S. 60; *U. S. v. Adams*, 320 U. S. 220; *Walker v. Johnson*, 312 U. S. 275; *Waley v. Johnston*, 316 U. S. 101; *Williams v. Kaiser*, 323 U. S. 471; *Johnson v. Zerbst*, 304 U. S. 458; *Rice v. Olson*, 324 U. S. 786; *Powell v. Alabama*, 287 U. S. 69.

3. The Circuit Court of Appeals adopted the findings of the District Judge contrary to the evidence adduced at the last hearing in the District Court. This is particularly true if the *substantial* evidence adduced is considered and the *substantial* evidence clearly shows that the factual conclusion reached is unsupportable.

Wherefore petitioner prays:

1. That a Writ of Certiorari issue out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 11059, *Marianna von Moltke, Appellant v. A. Blake Gillies, Appellee*, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment of said Circuit Court of Appeals herein may be reversed by this Court and petitioner remanded to the District Court of the United States for the Eastern District of Michigan, Southern Division, for such further proceedings as may there be determined.

2. That petitioner may have such further relief as this Court may deem just and proper.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

(Petitioner cannot make reference to the record)

OPINIONS BELOW

The District Court filed an opinion which has not been officially reported. The opinion of the Circuit Court of Appeals was filed April 6, 1951, and has not yet been officially reported.

JURISDICTION

Date of order and judgment of the Circuit Court of Appeals for the Sixth Circuit to be reviewed is April 6, 1951.

Section 240 of the Judicial Code as amended, being 347 (a), Title 28, U. S. C. A., is believed to sustain the jurisdiction of this Court herein.

STATEMENT OF CASE

The testimony had on the last hearing in the District Court on the question of what advice was given to petitioner by an agent of the Federal Bureau of Investigation in accordance with the prior opinion of this Court in this cause resulted in an equivocal and uncertain denial by the agent of the advice petitioner claims was given her and on all other matters, even those closely related to the question of the advice given her, the agent of the Federal Bureau of Investigation had a very faulty and imperfect memory. Petitioner's inability to carefully analyze the legal reasons why the conclusions of the District Court and the Circuit Court of Appeals for the Sixth Circuit is fortunately overcome by the capable, clear and concise dissenting opinion filed by Judge McAllister whose opinion petitioner herewith adopts as her Brief in Support of her petition for the issuance of a Writ of Certiorari. This dissenting opinion, is therefore, set forth in full herein. The opinion in its entirety reads as follows:

> "McAllister, Circuit Judge, dissenting. While most of the facts in this case have been set forth in the opinions on the prior appeal, the order of the district court dismissing the writ of habeas corpus,

now before us, makes it proper to supplement the statement of the circumstances surrounding the case, and to recapitulate them in the light of the present appeal.

"Mrs. von Moltke, who was living with her husband and two children, was arrested in her bed at her home between 6:00 and 7:00 in the morning by six agents of the Federal Bureau of Investigation who had been admitted to the house by her husband. She was ordered to get out of bed and dress, while the agents searched the house, after securing her consent, and that of her husband. Mrs. von Moltke was immediately taken to the headquarters of the Federal Bureau of Investigation in Detroit, fingerprinted, photographed, and examined by a physician. She was then subjected to questioning by two agents of the Federal Bureau of Investigation from 10:00 in the morning to 9:00 or 10:00 at night. This questioning continued for five consecutive days. Instead of being placed in a cell, she was locked alone in a room with a solid door, and kept in solitary confinement. She was not allowed to see or speak to anyone. She was not permitted to be visited by her husband or to write a note to him. Her husband did not even know where she was. The matron in charge of her detention was not allowed to speak to her. During this time, she was not told why she had been arrested; no charges had been made against her; she was not allowed to see an attorney; and she was told by the agents that she was not entitled to have an attorney or legal counsel. After five days of solitary confinement, she signed a statement prepared by the agents as a result of questioning her. Nine days after her arrest, she was taken before the Enemy Alien Hearing Board, and at 10:00 o'clock at night, she was subjected to a long examination. Up to this time, she did not know why she was being detained; no charges had been made against her; and she had not been allowed to have legal counsel or see a lawyer. Twenty-six days after

her arrest, the matron handed her a copy of the indictment against her for conspiracy to violate the Espionage Act. 50 U. S. C. A., Section 31, et seq. Twenty-nine days after her arrest, she was taken before the district court to plead to the indictment. She had no legal counsel, had been given no legal advice, and had not discussed the charges against her with any lawyer or anyone else. When she was brought before the court to plead, the district judge, finding that she was not represented by counsel, stated that she was entitled to have legal assistance and would have to have a lawyer to represent her. He called a young attorney from a group sitting in the courtroom and told him to represent her. The lawyer objected and stated that he did not want to have anything to do with the case. The district judge then assured him that it would only be for the arraignment. Upon this assurance and without seeing the indictment or discussing it with Mrs. von Moltke, the attorney had a short whispered conversation with her and told her that if she felt she was not guilty, it was advisable to stand mute; and the attorney then informed the court that the prisoner was standing mute. A plea of not guilty was entered. The district judge then told Mrs. von Moltke that he would appoint an attorney for her 'right away' and she was then taken to the county jail. After being informed by the court that an attorney would be immediately appointed for her, she waited in jail for another seventeen days. No attorney was thereafter ever appointed to represent her on her trial. She again appeared before the court on October 7, 1943, at which time she withdrew the plea of not guilty, which was entered for her when she stood mute, and pleaded guilty. She was then returned to the jail, where she was held for more than twelve months, during the greater part of which time she sought to withdraw the plea, and plead not guilty. Her motion to withdraw the plea of guilty was finally denied on November 15, 1944, and, simultaneously, she was sentenced to four years in prison.

At the time that Mrs. von Moltke withdrew her plea of not guilty and entered a plea of guilty to an offense which carried the death penalty (of which fact she was ignorant), she had, therefore, been held, either in solitary confinement in the Immigration Detention Home or imprisoned in the cell block at the county jail, for forty-five days without legal counsel or the appointment by the court of any attorney to represent her on her trial, or the retention by her of any lawyer for this purpose. No lawyer appeared for her or advised her when she pleaded guilty. It is conceded that the only legal advice she could have received during this entire period was that of the agent of the Federal Bureau of Investigation who had conducted the five days of questioning of her at the time of her arrest with the object of indicting her, and who, before advising her on the subject of the law of conspiracy and the significance of overt acts, told her that he was a lawyer and had been regularly admitted to the bar. If she did not have legal advice as to her rights from him, she had no legal advice whatever from anybody on this capital charge, in which, as Mr. Justice Black remarked on the prior appeal,[1] the conspiracy indictment was complex and required assistance of counsel for an understanding of the charges made, inasmuch as 'A layman reading the overt act charges of this indictment might reasonably think that one could be convicted under the indictment simply because he had, in perfect innocence, associated with some criminal at the time and place alleged"; and, concerning the general tenor of which, Mr. Justice Frankfurter observed that 'Because of its complexity, the law of criminal conspiracy, as it has unfolded, is more difficult of comprehension by the laity than that which defines other types of crimes.'

"It was undisputed that according to German law, a person accused of crime has the burden of

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[1] *von Moltke v. Gillies*, 332 U. S. 708.

proving his innocence. In the belief that our law was to the same effect, and feeling that she was unable to overcome such a presumption of guilt, Mrs. von Moltke, a German national, after receiving legal advice as to the law of conspiracy and crime with which she was charged, from the Federal Bureau of Investigation agent, testified she came to the conclusion to plead guilty. She was brought before the district judge for this purpose and signed a mimeographed form, stating that 'having been advised by the Court of my right to be represented by counsel, and having been asked by the Court whether I desire counsel to be assigned by the Court, do hereby, in open court, voluntarily waive and relinquish my right to be represented by counsel at the trial of this cause.' The court asked her if the indictment had been explained to her, and she said yes. The court then asked her if she was pleading guilty because she felt she was guilty, and she said yes. The court did not ask who had explained the indictment to her, and she did not volunteer the information that the only legal advice she had received was from the Federal Bureau of Investigation agent. The court did not explain the indictment to her or tell her what she was charged with. Neither did the court nor the district attorney nor anyone else tell her that the crime with which she was charged carried the death penalty. The entire proceeding took up only a few minutes of the court's time, sandwiched in between other proceedings. After her plea of guilty, she was remanded to jail to await sentence. She was then kept in jail for a year, before she was sentenced. In the opinion of the writer, the foregoing circumstances would, in themselves be enough to require the holding that Mrs. von Moltke did not freely, knowingly, and intelligently waive her constitutional rights to assistance of counsel and a trial.

"A few months after her withdrawal of the plea of not guilty and entry of the plea of guilty, and before sentence, on January 17, 1944, she testified that

she was informed for the first time by Robert S. Dunham, a Federal Bureau of Investigation agent, that, in the United States, it was necessary for the government to prove a person guilty of a crime rather than for the accused to prove his innocence. On January 18, the day after receiving this information, she had an interview with the district attorney, in which, as he testified, 'she wanted to go into the possibility at some time of changing her plea.' As proof of the fact that she did not know of the presumption of innocence, this testimony is the most persuasive in the case on this point. Dunham was a witness on the part of the government but did not dispute Mrs. von Moltke's statement that he told her in jail of the presumption of innocence for the first time on January 17; and she immediately saw the district attorney the next day on withdrawing her plea of guilty and entering a plea of not guilty. The district attorney later consulted the district judge, in March 1944, on the matter, but it dragged on until June 1944, when the district attorney appeared before the court with Mrs. von Moltke and suggested to the court that an attorney be appointed for her in order to file a motion to withdraw her plea of guilty. The court stated that she was within her rights in filing such a proceeding and afterward appointed a lawyer, on August 2, 1944, to file the motion for her and to represent her in the matter; and in five days, such counsel filed a motion to withdraw the plea of guilty. It was not, however, heard by the court until three and a half months later, on November 15, 1944. At that time, the court denied the motion to withdraw the plea and immediately sentenced appellant to four years of imprisonment on her plea of guilty. The court denied the motion to withdraw the plea of guilty on the ground that it was made too late under former Rule II (4) of the Rules of Procedure for Pleas of Guilty then in effect, which provided that a motion to withdraw a plea of guilty must be filed

within ten days of the entry of such plea. Up to the time of the court's decision on the motion, the district attorney was not certain that the time limit in the rule was mandatory, and testified on the hearing that there was some question in his mind at that time whether the rule was mandatory. It likewise seems to have been a matter of doubt in the mind of the district judge whether the rule was mandatory prior to the time of his decision, although he subsequently determined, by his decision, that it was.

"During all of this time, Mrs. von Moltke was being held at the Wayne County jail. She was not sentenced until twelve months after her plea; and ten months after she had discussed the possibility of withdrawing her plea of guilty with the district attorney. At the time of her sentence, she had, therefore, been held in jail for more than fourteen months from the time of her arrest, waiting during most of that period, to withdraw her plea of guilty; and apparently everybody, including the court, considered that she was fully within her rights in withdrawing the plea and that the plea was to be withdrawn, until, at the last moment, her motion was denied because of the time limitation governing motions to withdraw pleas of guilty contained in the Criminal Rules, and she was forthwith sentenced. If any other excuse existed for holding her in jail for a year after her plea of guilty before she was sentenced, it does not appear; and no credit for this protracted period of imprisonment was allowed by the sentencing court.

"With the foregoing as a recital of the background of the controversy before us, we come to the question of the legal adivce which Mrs. von Moltke received from E. Bert Collard, Jr., the agent of the Federal Bureau of Investigation. It was mainly upon this phase of the case that the Supreme Court reversed the judgment and remanded the case for further consideration on the prior appeal; and it

is upon the determination of this matter that the present appeal must largely depend.

"Not having had the benefit of the assistance of legal counsel before her plea of guilty, Mrs. von Moltke, on her prior hearing, testified that she repeatedly asked the agents of the Department of Justice for advice as to whether she should plead guilty or not. One agent testified that he absolutely refused to inform her as to her rights or to give her any legal advice. In the course of her difficulty, however, she had a conversation with Agent Collard, who volunteered the information that he was a lawyer and had been duly admitted to practice. Because of her acquaintance with him during the various examinations and interrogations which he had conducted, Mrs. von Moltke appealed to him to explain the indictment to her and to inform her of the meaning of the conspiracy and overt acts. He agreed to do so, and secured an office in the jail for this purpose. According to Agent Collard, his explanation to Mrs. von Moltke of the meaning of conspiracy lasted for several hours.

"This case has already engaged the extensive consideration of the courts. Four different district judges have taken part in its decisions; with the present adjudication in this court, the case has elicited four opinions on two appeals; and on the prior appeal in the Supreme Court, three opinions with differing conclusions were anounced. It was remanded by the Supreme Court for further hearings and explicit findings as to the legal advice given by the agent of the Federal Bureau of Investigation to Mrs. von Moltke, with as close a re-creation of the incident as possible, and for decision as to whether Mrs. von Moltke competently, intelligently, and with a full understanding of the implications, waived her constitutional right to counsel. As Mr. Justice Frankfurter expressed it, from the record then before the court with respect to the testimony of Collard on the crucial points of the case, he could not at

that time 're-create his tone of voice or the gloss that personality puts on speech.'

"On the hearing after remand, the district court found that Collard had not given the legal advice to Mrs. von Moltke which she claimed; that she did not rely upon such advice in changing her plea of not guilty to guilty; that she knew that her plea subjected her to the death penalty; and that she competently, intelligently, and with full understanding of the implications, pleaded guilty.

"From an examination of the record, I am of the opinion that the findings of the district court are not sustained by substantial evidence. To show why the findings are not sustained by substantial evidence, it is necessary to repeat a certain part of what had heretofore been recited in prior opinions in order to compare the vital and controlling testimony of Mrs. von Moltke and Collard on the first hearing and on the last hearing before the district court; and this can be best done by sufficiently comprehensive quotations of the testimony on these crucial points. In such manner, too, can be most nearly re-created the incidents that control decision in this case.

"On the first hearing, Mrs. Von Moltke testified that when Collard explained the indictment to her, she told him that she had never committed any of the overt acts charged against her. She further testified that Collard assured her that he knew she was telling the truth—and, in this, she was undisputed. She further testified: 'Mr. Collard explained to me that the "Overt" Acts in the indictment do not mean the real thing. . . . Mr. Collard explained to me that the indictment doesn't cover the charge, and I seemed not to be able to understand, so Mr. Collard explained the indictment to me by an example, which he called the "Rum Runners." . . . That if there is a group of people in a "Rum" plan who violate the law, and another person is there and the person doesn't know the people who are plan-

ning the violation and doesn't know what is going on, but still it seemed after two years this plan is carried out, in the law the man who was present becomes . . . the person is guilty of conspiracy. And I said to Mr. Collard: "If that is the law in the United States, I don't know how I ever can prove myself innocent, and how will any judge know how to judge me like that, if one is innocent and the law is such and such?" And Mr. Collard told me about the Probation Department. . . . He explained to me that it is the duty of this office— the Probation Department— to collect the proper data and present it to the judge, so that the judge will know what to go by.'

"Collard was a witness at that time, and on this phase of the case, testified:

'Q. Did you try to explain it (the indictment to her?

A. Yes, as I remember, I did. . . .

Q. Well, in explaining the indictment to her, what explanation did you give her?

A. I just tried to explain it the best I could. . . .

Q. Did you explain to Mrs. von Moltke the nature of a conspiracy?

A. I attempted to, yes.

Q. To the best of your ability?

A. Yes, sir.

Q. And did you spend some time on that particular phase of your explanation?

A. I do not recall, but we probably did.

Q. And did you during that discussion use an illsutration about a rum runner?

A. Well, I heard Mrs. von Moltke say that, and since she did I have been trying to recall, and I cannot remember such an illustration.

Q. I see.

A. But it is quite possible that Mrs. von Moltke's memory is better than mine, and I may have used such an illustration. . . .

Q. Did you in any way explain, or attempt to explain to Mrs. von Moltke the meaning of the word "feloniously"?

A. I cannot remember her asking that, but if she did ask me, I probably tried to explain it to her; but whether that was one of them, I just don't remember. . . .

Q. And did you explain to Mrs. von Moltke the nature of an overt act?

A. Well, if she asked me, I probably tried to, but whether she asked me or not I just don't remember.

Q. And did Mrs. von Moltke ask you whether merely conferring with people who later turned out to be guilty of criminal acts would also make her a criminal, and guilty of criminal acts?

A. I do not just recall that particular question. It is quite possible.'

"On the second hearing, Mrs. von Moltke testified, with regard to the advice given by Collard:

'Mr. Collard then explained the nature of business of a rum runner, and he then brought that out and said if several people are in one room and plan violation of the law, to hijack rum, and another person enters the room, they don't know—the person entering the room does not know the other people, he or she has never seen them, but happened to over listen their plan, and even after this plan is carried out, two years later, and the government becomes aware of the fact that the person at the time listening in to their planning, the person is guilty of conspiracy under the American law. That is what I understood Mr. Collard explained to me.'

This was the crux of the case. Did Collard give her this advice? The answer to this question must be judged from his testimony. My reasons for being of the opinion that the district court's findings were not supported by SUBSTANTIAL evidence are influenced mostly by Collard's testimony itself. (Emphasis by petitioner.)

"When Collard was sworn as a witness, the district attorney read Mrs. von Moltke's testimony, above set forth, as to what he told her, and he was asked:

'Q. Did you give her that advice?

A. *As a lawyer* I couldn't have given her that illustration of a rum runner.' (Emphasis supplied.)

"The court and the district attorney noticed at once that Collard was not contradicting Mrs. von Moltke's testimony on this crucial point, but was evasive on the issue. The court, however, insisted on having an answer to the question whether he had given the advice, as claimed by Mrs. von Moltke.

'The Court: Did you, or didn't you?

Q. (By Mr. Fordell, the district attorney): Did you give her an illustration?

The Court: First begin with the illustration. Did you give her the illustration in the manner she has outlined you gave it to her, *and if you did not, could she have arrived at that conclusion from anything you said?*

A. No, sir.

Q. (By Mr. Fordell): You do recall giving her an illustration, is that it?'

"The witness was guided by suggestive and leading questions in this testimony on the crucial point. The above question, however, was answered in this fashion:

'A. I said at the other hearing *it is quite possible* I gave her an illustration concerning a rum runner's case, yes, sir, but not the illustration as she said in her testimony, no, sir.'

"What the witness actually said at the other hearing was, as herefore stated, that he could not remember using an *illustration about a rum runner,*

'But it is quite possible that Mrs. von Moltke's memory is better than mine, and I may have used such an illustration.'

"Here, the court interposed:

'The Court: The court would be interested, Mr. Fordell, in knowing what the illustration was he gave her, *if he did give her one.*'

Q. (By Mr. Fordell): Do you recall the illustration that you gave her?

A. *To the best of my ability now, to remember, it is quite possible* while talking to Mrs. von Moltke that I used an illustration of a rum runner's case to attempt to show the general law of conspiracy. And to the best of my memory *now, if I did use such case, I probably* told her that where several people get together and decide among themselves to run rum across the Detroit River, and should subsequently one of those persons proceed to run some rum across the Detroit River, those persons who would be together originally agreeing to so run the rum would be guilty of conspiracy.

The Court: That wouldn't be exactly true either, would it Mr. Fordell?

Mr. Fordell: It is the general law if two people agree to violate a law and one commits an overt act to carry out that agreement, both of them are guilty.

The Court: Yes, if one of them does anything to carry it out.

Mr. Fordell: That is right.

A. (Mr. Collard): *That is what I meant to say.*'

"Everything in the foregoing that Collard testified to was entirely suppositious and hypothetical and of so little probative value that it would have been error on the part of a court to refuse to strike

it out on motion in the course of a trial. At the prior hearing, Collard testified he could not remember anything with respect to using an illustration about a rum runner, but that it was quite possible that Mrs. von Moltke's memory was better than his and that he may have used such an illustration. He seems to have been a humane man and an inherently honest witness. He testified, on the last hearing that he considered Mrs. von Moltke's memory, at that time, every bit as good as it was on the first hearing. It is of the highest importance to keep in mind that his testimony as to the legal advice he gave Mrs. von Moltke and the illustration of the rum runner was based upon circumstances that he admitted he did not remember, and was explicitly restricted by him to a supposition—'it is quite possible . . . if I did use such case, I probably told her. . . .' With this primary and controlling premise as the foundation of his testimony, the following continuation of his evidence does not detract from the fact that all his testimony was admittedly based on supposition. And this conclusion is emphasized by the fact that his answers were elicited only by a series of leading and suggestive questions.

"Continuing the testimony of Collard:

'The Court: That is, it is possible for one to withdraw from a conspiracy—I will have to read that. In other words, according to her statement she had the idea if she happened to be in the room where some people conspired, and two years afterwards if they did something, the fact she was in the room would be sufficient to convict her. Did you ever give her any such information?

A. No, sir. That I definitely did not give her, no, sir.

The Court: That wouldn't be anything near the law, would it?

A. No, sir, it would not be.

The Court: And there has to be an agreement in a conspiracy, and one person must do an overt act?

A. That is right.

The Court: And if one person does an overt act then those who have agreed to the conspiracy, are all liable?

A. Yes, sir.

The Court: *That is what you think you told her?*

A. Yes, sir.

* * * * * *

The Court: Of course, in giving any kind of illustration you didn't go into all the details and possibilities?

A. No.

The Court: *Are you sure that you made it clear to her* that she must have participated in the agreement?

A. Yes, sir.

The Court: Or understanding.

A. Yes, sir.

The Court: It didn't have to be in writing.

A. That is right, it doesn't have to be in writing.

The Court: There is no question in your mind but what she understood what you were saying?

A. That is right, yes sir.'

"Taking the foregoing testimony of Collard as a whole, together with his prior admissions that he remembered nothing of using any illustration of a rum runner, and his concessions that Mrs. von Moltke's memory was better than his own, it is impossible to conclude that such testimony constitutes substantial evidence to sustain findings based upon it; and this view is confirmed by a reference to his testimony on the many other crucial matters hereafter set forth. The government argues that the weight of the evidence and the credibility of the wit-

nesses was for the trier of the facts, and its findings thereon can not be disturbed. Of this proposition it is sufficient to say that, if it is the law, it is not the whole law. When fully stated the principle, like most legal abstractions, embodies universally recognized qualifications and exceptions. The jury's right to be "sole judge" of the matters mentioned does not exist where their judgment is against the plain and decided preponderance of the evidence, and the question whether this preponderance exists rests finally with the court. This judgment of the court, litigants have the right to invoke, and the performance of this duty neither trial nor appellate court may timidly or indolently evade.' *Burgess v. Gilchrist,* 123 W. Va. 727, 17 S. E. (2d) 804, 138 A. L. R. 676, 684. Although, in the instant case, we are concerned with what is described in the federal courts as 'substantial evidence' rather than the 'clear preponderance of the evidence' or the 'sufficiency' of the evidence as a basis of recovery, as the court put it, the rule is the same; for when it is made to appear that there is a want of substantial evidence to support a charge appealed from, the case must be reversed. *United States v. McAlister,* 88 F. (2d) 379 (C. C. A. 9). And substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Co., et al. v. National Labor Relations Board, et al.,* 305 U. S. 197. Moreover, a fair reading of Collard's testimony, with its uncertainties, contradictions, and vagueness in relation to the facts as testified to by Mrs. von Moltke, and in many cases, his total failure to remember many of the most crucial events in which he was one of the chief participants, does not really present an issue of credibility as between these two witnesses. The foregoing conclusion is strengthened too by the fact that on both hearings before the district court, Mrs. von Moltke testified that throughout her interviews with Collard, she told him repeatedly that she had

not committed any of the overt acts with which she was charged in the indictment, and that Collard, in response, told her that h[e] knew she was telling the truth about such acts; [a]nd although Collard was also a witness on behalf o[f] the government on both hearings, he, in no way, contradicted or disputed this testimony. Accepting such testimony as true, it is impossible to believe that Collard himself considered that Mrs. von Moltke would be guilty, under the law, of the charges made against her in the indictment, and that, rather, he must have labored under a misapprehension of what constituted guilt under the complicated law of conspiracy.

"At the time Collard gave the legal advice to Mrs. von Moltke as to the law of conspiracy and overt acts, as well as the illustration of the rum runners, he had practiced law only three years. In his practice, he had never been engaged in any case involving the law of conspiracy or in any prosecutions under the prohibition or other liquor acts. He testified he could not remember why he thought it necessary to use an illustration involving rum runners or why he thought that Mrs. von Moltke would understand such an illustration.

"All of Collard's testimony depended entirely upon his memory, and where he was not admittedly mistaken, he could not remember even the most important features of his conversations with Mrs. von Moltke and his advice to her. On the first hearing, he deferred to Mrs. von Moltke's memory on the crucial matters. On the second hearing, he could hardly remember anything that he had testified to on the first hearing, and to all questions referring to his previous testimony, his reply was that if the record showed he had so testified, he would stand by it.

"On the prior hearing, Collard was asked:

'Q. And did Mrs. von Moltke ask you whether merely conferring with people who later turned out to be guilty of criminal acts would also make her a criminal, and guilty of criminal acts?

A. I do not just recall that particular question. It is quite possible.'

"On the later hearing, when asked whether he had testified to the foregoing on the prior hearing, his answer was:

'A. If that is what the record says that is what I said, yes.

Q. If that is what the record says, you don't dispute it?

A. I don't dispute anything in the record.

* * * * *

Q. And you did discuss that matter with Mrs. von Moltke?

A. It is just like the answer says, I don't recall doing it, but it is quite possible, it could have been. Yes.

Q. Is your recollection on that point any better now than it was then?

A. I hardly think so.'

"As bearing upon Collard's memory on one of the important phases of the case, he was asked as to his questioning Mrs. von Moltke at the Immigration Home:

'Q. Did you or did you not tell her she was not entitled to an attorney?

* * * * *

A. I just don't remember.'

"Concerning the advice which he gave her after her indictment, Collard was asked:

'Q. What questions did Mrs. von Moltke ask you about the indictment?

A. I don't recall any right now.

* * * * *

Q. Did Mrs. von Moltke ask you in connection with the overt acts whether the things that she was charged with doing, such as introducing peo-

ple to one another and conferring with people, might not have been innocent on her part?

A. It is quite possible she did. I just don't remember.

• • • • •

Q. (By Mr. Field): What did you tell Mrs. von Moltke that she was charged with?

Mr. Fordell: I object to that question, your Honor.

The Court: If he can remember.

Mr. Fordell: The question is predicated on the assumption that he formally told her what the charges were.

The Court: This man is an F. B. I. If he can't take care of himself on the stand, neither you nor the court can. . . . Give me the question again, please. (Question read.)

Mr. Fordell: That is assuming that he told her what she was charged with—

The Court: If he didn't, he can say so, can't he, how much in detail he went? He may answer.

• • • • •

A. I just can't remember. Is there any specific thing you want to know? I can't remember in general.

• • • • •

Q. . . . did Mrs. von Moltke tell you that she had heard from a fellow prisoner that unless she pleaded guilty to the indictment her husband would be arrested?

A. I don't remember.

• • • • •

Q. Did Mrs. von Moltke, after the conference about the indictment, ask you whether, if all the other defendants in the case pleaded guilty, she would be entitled to have a trial?

• • • • •

A. I am sorry, I don't remember that.

• • • • •

Q. Did, at that time, you advise Mrs. von Moltke that if she went to trial the Government would have to prove those charges against her by evidence beyond a reasonable doubt?

A. I don't remember.

Q. Do you think you did?

• • • • •

A. I said I don't know.

Q. There is no doubt in your mind, is there Mr. Collard, that you did advise Mrs. von Moltke concerning the Probation Department?

• • • • •

A. I don't remember so advising her about that.'

"As bearing upon his memory of what he testified on the former hearing, he was asked:

'Q. Getting back to a former question at the prior hearing, were you asked the following questions and did you give the following answers:

"Q. Now, you mention also in your affidavit that Mrs. von Moltke discussed with you her desire to change her plea of guilty, and that you advised that it was her privilege to do so, and informed her of the proper way to get in touch with the United States Attorney?

A. Yes.

Q. You did that, didn't you?

A. Yes, sir, I did that.

Q. And you told her that was her privilege to change her plea?

A. Yes, I certainly did."

A. That isn't my testimony. That is another agent's testimony.

Q. You don't think that was your testimony?

A. I say, if the record shows that is my testimony, I certainly said it, yes, sir.

• • • • •

The Court: He says if he did say it, but he says he thinks it is somebody else's testimony you are reading from; is it or is it not?

Mr. Fordell: No.

Mr. Field: It is Mr. Collard's testimony.

A. All right, I am sorry. I was in error.'

"In view of the repeated failure of the witness Collard to recall any of the important matters in his discussion with Mrs. von Moltke and his advice to her, it can hardly be said that his testimony, given on the last hearing with regard to the illustration of rum runners, because of its qualification, and suppositious and hypothetical character, constituted substantial evidence to sustain findings based upon it. However, even with regard to this illustration, his memory was not to be trusted, as evidenced in his cross-examination on this point. After he had stated that he could not recall whether Mrs. von Moltke asked him whether merely conferring with people who later turned out to be guilty of criminal acts would make her guilty of criminal acts, he was asked:

'Q. And you did discuss that matter with Mrs. von Moltke?

A. It is just like the answer says, I don't recall doing it, but it is quite possible, it could have been. Yes.

Q. Is your recollection on that point any better now than it was then?

A. I hardly think so.

Q. But it is better now than it was then with respect to the illustration that you used, is that right?

A. Yes, sir, because I was never asked a question before on the illustration.'

"Here the witness was completely mistaken because on the prior hearing, he had been asked the question about the illustration:

'Q. And did you during that discussion use an illustration about a rum runner?

A. Well, I heard Mrs. von Moltke say that, and since she did I have been trying to recall, and I cannot remember such an illustration.

Q. I see.

A. But it is quite possible that Mrs. von Moltke's memory is better than mine, and I may have used such an illustration. . . '

"On the last hearing, Collard was asked:

'Q. (By Mr. Field): On the first hearing in this court you testified that you believed that Mrs. von Moltke's memory was better than yours, is that correct?

A. If it is in there, yes, sir.

Q. Only if it is in there?

A. Well, if I testified at the former hearing to such a fact, I am sure it will be in the record.

The Court: No, he didn't ask you that. "Do you say that?" "What do you say now?" I think it would be better to put it in that way, don't you, Mr. Field? As to whether you think her memory is better than yours, if you said before it was, what do you say now?

A. It is every bit as good now as it was before.

Q. (By Mr. Field): Whose?

A. Mrs. von Moltke's.'

"The contention that, on the second hearing, there was a direct denial on the part of Collard that he gave the illustration of the rum runners, as testified to by Mrs. von Moltke, this denial having been absent on the first hearing, it is not impressive, in view of the nature of his testimony, as above set forth.

"In view of the fact that Collard had told Mrs. von Moltke that she was not entitled to see a lawyer or have any legal counsel during the period of her arrest on the Presidential warrant, it was important to ascertain whether he had subsequently informed her that she was entitled to legal counsel after her

indictment, as she continued to remain under arrest during all of the period up to her final plea. He was asked:

'Q. (By Mr. Field): Did you at any time after the indictment had been served on Mrs. von Moltke advise her that she had been technically rearrested on the indictment and released from the proceedings under which she was arrested under a Presidential warrant?

A. I don't remember, Mr. Field.

Q. You don't remember that you did that?

A. No, sir. The record may so reflect. I do not know.

Q. Do you recall now any occasion when you told Mrs. von Moltke that the situation, so far as her right to have counsel was concerned, was any different after she was indicted than it was before she was indicted?

A. I just don't recall.

* * * * *

Mr. Fordell: I understood they were not entitled to counsel if arrested under Presidential warrant.

The Court: It doesn't make any difference. *She certainly is entitled to counsel when she is indicted.*

Mr. Fordell: There has never been any question about that.

Mr. Field: No, unless she was informed, your Honor. But now that she was indicted she was entitled to counsel. She didn't know it. This woman is not a woman who is versed in legal lore or regulations.

The Court: Is the contention made here she wasn't informed of her right to have counsel?

Mr. Field: That is right.'

"As part of defendant's proof in showing that Collard told her when she was arrested and held at the Immigration Detention Home that she was not

entitled to legal counsel, and that he never subsequently advised her, after her indictment, that she was entitled to counsel, Collard was asked:

'Mr. Field: . . . In the lower court, on the original hearing, . . . you were asked the following questions, and did you make the following answers:

• • • • •

"Q. What, if anything, did you say to Mrs. von Moltke to indicate to her that the indictment was a new proceeding?

• • • • •

"A. As I recall it, when I first went over to the County Jail at Mrs. von Moltke's request on October 2, she had the indictment, and I explained to her that she had been indicted by the Federal Grand Jury, and I explained to her that technically she had been rearrested on that indictment, and she told me that she had been arraigned; . . . So if that is what you mean by 'new procedure,' I did tell her that."

Do you recall so testifying?

A. Yes, sir. I don't deny anything that is in the record, Mr. Field.

Q. And did you, in addition to telling Mrs. von Moltke that she had been technically rearrested, advise her that now she was entitled to the assistance of counsel under the Sixth Amendment to the United States Constitution?

A. I don't remember, Mr. Field.

• • • • •

Q. (By Mr. Field): Mr. Collard, at the time you had the conference at the County Jail with Mrs. von Moltke, do you recall her telling you she believed the attorney who was to be appointed by Judge Moinet had not appeared, and that he wouldn't appear because she was an alien and therefore, not entitled to counsel?

A. I don't remember that, Mr. Field.'

"Mrs. von Moltke testified that after she had been arrested on a Presidential warrant, she was told by Agent Collard that she was not entitled to have any legal advice, or consult a lawyer. She stated that she did not realize the fact that the indictment, thereafter returned against her, entitled her to have legal counsel, and she further testified that she thought the district judge informed her that he would appoint a lawyer for her only because of his being unaware of the fact that she was an enemy alien. The record on this phase of the case is as follows:

'Mr. Field: The position in this: That Mrs. von Moltke was advised before the indictment that she was not entitled to counsel. . . . And after she got the indictment she was not advised that she was entitled to counsel; . . . She didn't know it was a different proceeding at all.

The Court: You haven't asked her that. . . .

Q. (By Mr. Field): Were you represented by counsel prior to the time that you received the indictment?

A. No.

Q. Were you represented by counsel after you received the indictment?

A. No.

Q. Were you told by anybody representing the Government after you received the indictment that you were then entitled to have the assistance of counsel?

A. No.

Q. And when you appeared for arraignment before Judge Moinet were you advised then that you were entitled to counsel?

A. I was told then that I have to have counsel. . . . Judge Moinet asked whether I had funds to retain counsel and I told him I had not. And so he says he would appoint counsel for me.

Q. And did he appoint counsel to represent you at the arraignment?

* * * * *

The Court: What does it say on the record, that he just appointed counsel for the arraignment?

Mr. Field: For the arraignment only.

• • • • •

Q. (By Mr. Field): And at the conclusion of the arraignment was anything said to you by Judge Moinet about any other counsel?

A. Judge Moinet said he would send counsel right away.

Q. Right away?

A. Yes.

• • • • •

Q. After the arraignment did any counsel come from Judge Moinet to represent you in the case?

A. No.

Q. And did any counsel ever come who had been appointed by the court to represent at the trial?

A. No.'

"It was undisputed that at the time of her arrest on a Presidential warrant and during the twenty-nine days of her imprisonment until the indictment was returned, Mrs. von Moltke had been told that she had no right to see a lawyer or to have assistance of counsel. After she had been brought before the court and advised to stand mute by the counsel appointed in open court, who, as heretofore stated, refused to serve except for the arraignment, she was told by the court that a lawyer would be appointed for her right away to help her on her trial. When no lawyer ever appeared, Mrs. von Moltke concluded, according to her testimony:

'I thought that there must have been some mistake in that Judge Moinet wasn't aware of the fact that I was an enemy alien, as he said he would appoint counsel for me. *I was not aware of the fact that I, even as an enemy alien, enjoyed the protection of the constitution at this time,* so I

thought that there would be no counsel appointed for (me).

Q. And were you so advised at the time you were arrested that as an enemy alien you had no right to counsel?

A. I had no right to counsel.

The Court: By whom?

* * * * *

A. Twice, once by an agent of the F. B. I.

* * * * *

The Court: Is that the rule, enemy aliens are not entitled to an attorney?

Mr. Field: That is the rule.

Mr. Fordell: Not entitled to have counsel at the Enemy Alien Hearing.

The Court: All right, then they told her the truth.

* * * * *

The Court: Now he did appoint an attorney for her? He appointed an attorney at the arraignment?

Mr. Field: At the arraignment, yes, your Honor, he said he would appoint another attorney right away to represent her at the trial.

* * * * *

The Court: You say he never appointed one?

Mr. Field: The file shows no appointment and no attorney appeared, your Honor.

The Court: All right.'

"The government emphasizes that even though Judge Moinet sent no counsel to Mrs. von Moltke after he had told her he would do so, nevertheless, Judge Lederle would accept her plea of guilty only on a written waiver of right to counsel; and that, therefore, she knew she had such a right. This is not very persuasive. She had been advised at the time of her arrest that she had no right to counsel. When Judge Moinet failed to send counsel, she as-

sumed that he had been mistaken when he said he would do so because of the fact that he was unaware that the appellant was an enemy alien; and she did not know that, as an enemy alien, she had the protection of the Constitution. If her conclusion was reasonable with regard to Judge Moinet, it was equally reasonable with regard to the judge who accepted her plea.

"The district court referred, in his findings, to the fact that Collard, as well as another agent, had told Mrs. von Moltke that the question of her plea should be discussed with her attorney and that she replied she did not want an attorney; that her husband urged her to do something until she had consulted legal counsel and even specified the name of the attorney. A fair reading of the record, however, shows that these statements revolved around the two young lawyers who had come to see her at her husband's request while she was in jail. These lawyers had been students of her husband in the Language Department of Wayne University. The undisputed evidence showed that they never agreed to be her counsel, never gave her any legal advice, informed her that they would not represent her, and warned her that they would not even hold what she said in confidence, but would feel free to disclose anything she said to the district attorney. Her desire to avoid such kind of advisers and her declining to consult further with them hardly warrants the conclusion that she deliberately rejected legal counsel. The district court, in its opinion, referred to the testimony of one of the agents who testified that he said to Mrs. von Moltke that they understood her husband was interested in obtaining an attorney for her and that, in reply she jerked her shoulders and said she was not interested. The attorney in question, whose name her husband had suggested, was one of those who had told her that he would not represent her or hold what she said in confidence. Mrs. von Moltke testified that he had treated

her so insolently when he came to the jail that, in ordinary life, she would have left the room in humiliation. In this connection, it is to be noted that immediately upon her arrest, her husband was discharged from his teaching position at the University and was obliged to support his family as a clerk in a drugstore at $35.00 a week; that neither Mrs. von Moltke nor her husband had any funds for the employment of attorneys; and that they could secure legal counsel only by appointment of the court.

"Mrs. von Moltke testified that she was never told by anyone of the consequences of her plea of guilty, and was never informed that the crime with which she was charged carried the death penalty. The trial court seemed skeptical about this testimony and remarked:

> '. . . if she didn't know, an intelligent woman, if she didn't know by the time she pled guilty, if she didn't know that they could send her up for life or the death penalty, it seems very funny to me. But it isn't any queerer than the fact that so far somebody among the District Attorneys, or the F. B. I., or somebody at some time didn't tell her that, if she didn't know it.'

"With regard to representatives from the district attorney's office, the court stated:

> 'I am pretty sure that John Babcock (Chief Assistant District Attorney)—John Babcock is a rather careful attorney, *he would have made sure she understood what was in the indictment.*'

"But Mr. Babcock testified that he never advised Mrs. von Moltke with regard to the indictment, or even discussed it with her. As to the representatives of the F. B. I., mentioned by the court, Collard, who was the only one who consulted and advised with Mrs. von Moltke with respect to the indictment, testified:

'Q. (By Mr Field): Did you at any time advise Mrs. von Moltke of the possible consequences of a plea of guilty?

A. I don't remember.

Q. Did you hear anyone advise her of the consequences of such a plea?

A. I don't remember so hearing anyone.

Q. You didn't tell her that by pleading guilty she would subject herself to the death penalty, did you?

A. I don't remember so telling her.'

"Mrs. von Moltke had testified that during the time she was confined to the county jail, there was a daily delivery of newspapers and that they were made available to her and that she read them. The government, in order to show that she had learned about the death penalty from newspaper accounts, introduced a number of Detroit newspapers dated September 17 and September 18, 1943, which contained statements that the crime with which she was charged carried the death penalty. But Mrs. von Moltke was confined to the Immigration Home until September 21, where there was no delivery of newspapers, and she was not confined in the county jail until noon of September 21; and she declared that she had never seen any newspaper accounts of the penalty for the crime charged. The trial judge then asked:

'The Court: When she pled guilty didn't it appear in the paper that she might face the death penalty?

Mr. Field: . . . I don't know.

The Court: When she was arraigned, didn't it appear that way? You get a lot of things in there that aren't important; they must have gotten that in.

Mr. Field: There is no testimony that she was informed either by Judge Lederle or Judge Moinet that she might be subject to the death penalty.

The Court: Well, *I suppose the Judge thought she had been over there so much with the other members, and so much of it in the paper, that she knew the consequences of her act.*

* * * * *

Mr. Field: That could be a fatal error if that supposition is true.

The Court: If she didn't know about the death penalty?

Mr. Field: Yes, your Honor.

The Court: It might be, but I don't see how it is possible anybody charged with this kind of crime, with all the publicity there was, and her husband out of jail and reading, how it would be possible for her not to know that the death penalty might not be the result.

Mr. Field: On the other hand, your Honor, it isn't expected the defendant will learn of the nature of the penalty from the newspapers.

The Court: Don't forget this, the burden of proof is on her here now.

Mr. Field: Yes, your Honor.

The Court: I don't care where she gets the information, if she gets it.

Mr. Field: I think due process of law, your Honor, would require that the defendant be advised of the penalty.

The Court: That certainly is true, but the question isn't now whether she is guilty or not guilty, the question is, did she know what she was doing? I don't know whether it is absolutely necessary that she know the penalty. The Supreme Court didn't say.

Mr. Field: Yes.

The Court: No, the Supreme Court said it didn't appear that she was so advised as bearing upon whether she knew what she was doing or not.

Mr. Field: That is right, your Honor.

The Court: But that doesn't mean she has got to know what the penalty is.'

"'Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after the proper advice and with full understanding of the consequences.' *Kercheval v. United States*, 274 U. S. 220, 223. When a person accused of crime appears before the court without legal counsel on a plea of guilty to a charge carrying the death penalty, it would seem to be a deprivation of constitutional right to accept such a plea, without advising him of the possible consequences.

"The district court subsequently, without further evidence on the point, found that Mrs. von Moltke, at the time of her plea of guilty, was well aware of the death penalty. There was no substantial evidence to sustain this finding.

"With regard to the finding that Mrs. von Moltke decided to plead guilty before she received the advice from Collard, and, therefore, was uninfluenced by it, this does not appear to be substantiated by the record. As to the date of her conference with Collard, while she testified that she thought it took place on September 27, she admitted that was only her recollection, and she testified that she might be mistaken as to the date. Collard placed the date as October 2. Under these circumstances, there seems no contradiction between them and it can be assumed that it was October 2. Among other matters that had been discussed prior to this conference with Collard, Mrs. von Moltke had asked Agent Kirby, of the Federal Bureau of Investigation, whether, if all of the others accused of the conspiracy pleaded guilty, she would still have a *right to a trial*, and he answered her, according to his testimony, that in such a case, 'the question of the trial would be up to the United States Attorney's office.' Furthermore, she was greatly worried over the effect that newspaper publicity would have upon her husband, and had been told that he too would be

arrested, unless she pleaded guilty. Hanaway testified that she told him she had decided to plead guilty on certain conditions and he stated to her he would see Mr. Babcock, who was handling the case in the district attorney's office, and convey this information to him. He did so, but Mr. Babcock told him he had no control over questions of deportation, newspaper publicity, or the place where she would serve a sentence if she pleaded guilty, these being matters with which she was concerned. Mr. Babcock testified that a few days after he had seen Hanaway, he had a talk with Mrs. von Moltke in the marshal's office. and at that time, 'she was resolving in her mind the question of whether she should or should not plead guilty, and finally advised me that her then decision was not to plead guilty. . . . I told her that under any circumstances anything I might reply to her questions must not have any bearing whatsoever upon her decision to plead guilty or not plead guilty; that she would have to decide that for herself, on the basis of whether or not in her own conscience she had to say that she was guilty.' The government, in its brief, contends no more, on this phase of the case, than that on September 28, Mrs. von Moltke, 'changed her mind about pleading guilty, and several days later, she decided to plead guilty without any promises.' The foregoing seems clearly to indicate that Mrs. von Moltke had not decided to plead guilty prior to October 2; and there is no proof that she was uninfluenced by Collard's advice because she had determined to plead guilty before he counseled her.

"Perhaps here it should be said that it appeared on the last hearing that Mrs. von Moltke and her husband owned property in Kiel, Germany, from which income could be secured by one living in that country. She had a son there, before and during the war, and he could avail himself of the income in question. Although her husband was a naturalized American citizen, she was not, although she had a petition pending. Her other two children were born

in this country. Her loyalties were divided—if not German—and she seemed to feel that she owed allegiance to Germany until she was granted American citizenship. This feeling was, apparently, based also on the fear that the German government would confiscate the property in Kiel if they learned that she had abandoned her German citizenship. But in spite of these attributes, subject to question and suspicion, whether her admitted conduct was explicable as innocent or guilty was a question for a jury. And her innocence or guilt of the charge against her is not before us in this proceeding.

"In conclusion, there remains to consider the significant statement in the findings of the district court with respect to pleas of guilty in criminal cases. A heavy responsibility undoubtedly was placed upon the shoulders of the district court in this case to 're-create' the circumstances in a case heard by another judge, who, the Supreme Court intended, should report his findings. But that judge had, in the meantime, died. The fact that the writer is not in accord with the findings in this case derogates in no way from the conclusion that the trial judge discharged the duties assigned him most conscientiously and creditably.

"In presenting the problem in this case, the court summed it up by saying: '. . . if the burden of proof is going to be placed entirely upon the court how can any district judge accept the plea of guilty, in any case unless he places on the record in every instance enough evidence to cover every possible imaginative story that a defendant may concoct when after making his plea of guilty, he recants and brings habeas corpus. Isn't it enough that the judge be assured in his own mind that the prisoner knows what he's doing and knows what his constitutional rights are?"[2]

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[2] During the trial, counsel for appellant stated to the court that this case had brought about a change in the procedure in

the State of Michigan on pleas of guilty, by the adoption of Court Rule 35a. The Rule provides:

"Criminal Procedure—Arraignment and Sentencing.

"In every prosecution wherein the accused is charged with a felony the trial court shall conform to the following practice:

"Sec. 1. Arraignment. If the accused is not represented by counsel upon arraignment, before he is required to plead the court shall advise the accused that he is entitled to a trial by jury and to have counsel, and that in case he is financially unable to provide counsel the court will, if accused so requests, appoint counsel for him. If the accused states he will procure counsel or requests that counsel be appointed, a reasonable time thereafter shall be allowed for counsel to consult with the accused before his plea shall be taken.

"Sec. 2. Imposing sentence. If the accused pleads guilty, after such plea and before sentence the court shall inform the accused of the nature of the accusation and the consequence of his plea; and regardless of whether he is represented by counsel, the court shall examine the accused, not necessarily under oath, and as a condition of accepting the plea of guilty and imposing sentence shall ascertain that the plea was freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency. Unless the court determines that the plea of guilty was so made, it shall not be accepted.

"Sec. 3. Record. The trial court shall cause a stenographic record to be made and promptly transcribed of the proceedings had under sections 1 and 2 above, and shall certify over his signature thereto that the same is a true record of the proceedings had. Thereupon the record so made shall be filed with the clerk of the court and become and be kept as a part of the record in the case. In any subsequent proceedings such record shall be competent evidence of the facts and circumstances therein recorded.

"This rule is mandatory but failure to comply therewith shall not be considered jurisdictional."

"I do not believe it is enough that the judge, in accepting a plea of guilty, be assured in his own mind that the prisoner knows what he is doing and what his constitutional rights are. It is possible that a judge might assume, without making a thorough inquiry or sufficiently examining the accused on a plea of guilty, that he knows what the charges mean

to which he pleads guilty and the consequences of such a plea. In such a case, it is necessary, on a plea of guilty by a prisoner without legal counsel, that the court make a thorough inquiry and clearly ascertain from the accused that his plea was freely and understandingly made. That was not done in this case.

"The evidence discloses that Mrs. von Moltke had no way of obtaining legal counsel except by appointment by the court; that although the court stated it would appoint legal counsel for her immediately after her arraignment, no such counsel was ever appointed; that she did not know of the presumption of innocence but believed the burden, as in Germany, was upon her to prove her innocence; that the only legal advice she obtained was from the agent of the Federal Bureau of Investigation, who used complicated illustrations of the law of conspiracy and advised her erroneously; and that she was never informed of the consequences of a plea of guilty to a crime that carried the death penalty.

"For the foregoing reasons, I am of the opinion that the record shows clearly that appellant did not competently, intelligently, and with full understanding of the implications, waive her right to counsel; that her plea of guilty was not understandingly made; and that the findings of the district court to the contrary are not sustained by substantial evidence."

CONCLUSION

Upon this record and under the applicable law as expounded by this Court and the provisions of the Vth and VIth Amendments to the Constitution, it is earnestly contended that the Writ of Certiorari prayed for herein should be granted.

Respectfully submitted,

MARIANNA von MOLTKE,
Petitioner,
11142 Kercheval Avenue,
Detroit 14, Michigan.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 78

MARIANNA VON MOLTKE, PETITIONER

v.

A. BLAKE GILLIES, SUPERINTENDENT OF THE DETROIT HOUSE OF CORRECTION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court on the first hearing (R. 170-174)[1] is reported at 72 F. Supp.

[1] The symbol "R" refers to the printed record of the proceedings on the first hearing, and "Tr." to the supplemental transcript on the second hearing which is not printed. On the second hearing, by agreement of counsel, it was ordered that all records, proceedings and evidence in the original hearing before District Judge O'Brien be admitted into and considered as part of the proceeding in the rehearing of the matter before District Judge Picard.

994. The majority and dissenting opinions in the Circuit Court of Appeals on the first appeal (R. 182-198) are reported at 161 F. 2d 113. The opinion of this Court remanding the cause for further testimony is reported at 332 U.S. 708. The second opinion of the District Court (Tr. 709-729) is not reported. The second majority and dissenting opinions in the Court of Appeals (attached as an appendix to the supplemental trial transcript) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered April 6, 1951 (Tr. 752). The petition for a writ of certiorari was filed May 28, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court's finding that petitioner had failed to prove that she had waived her right to counsel and pleaded guilty in reliance on erroneous advice of an F.B.I. agent, is supported by substantial evidence.

STATEMENT

The instant Petition is a sequel to proceedings considered by this Court previously in *Von Moltke* v. *Gillies,* 332 U.S. 708, in which this Court remanded the cause for further testimony.

The proceedings were instituted on February 7, 1946, when petitioner, who had been sentenced to four years imprisonment for violation of the Espionage Act of June 15, 1917 [2] (R. 8-9), brought

[2] Title I, c. 30, 40 Stat. 217 (50 U.S.C. 32, 34).

a habeas corpus proceeding in the District Court for the Eastern District of Michigan (R. 1-8) collaterally attacking the judgment on the ground that her plea of guilty and her waiver of right to counsel were not competently and intelligently made. On April 26, 1946, after a trial of the issues, the writ was dismissed (R. 175; 72 F. Supp. 994). On appeal to the Court of Appeals for the Sixth Circuit, the judgment was affirmed (R. 181), one judge dissenting (R. 189-198; 161 F. 2d 113). This Court granted petitioner's first petition for certiorari, and after review, rendered three opinions without majority.

Four justices were of the opinion that, on the undisputed facts, petitioner's conviction should have been set aside.[3] Three justices were of the opinion that petitioner had failed to establish her claim.[4] Two justices[5] thought that there was insufficient evidence on what was to them the critical issue, "the truth of petitioner's allegation that she was advised by an F.B.I. agent, active in the case, that one who merely associated, however innocently, with persons who were parties to a criminal conspiracy was equally guilty." Accordingly the cause was remanded to the District Court "so that it may hold further hearings and give consideration to, and make explicit findings on, the questions of fact discussed in the separate opinion" [of Justice Frankfurter] 332 U.S. at p. 727.

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[3] Opinion of Justice Black, 332 U.S. 708-727, concurred in by Justices Douglas, Murphy and Rutledge.

[4] Opinion of Justice Burton, 332 U.S. at pp. 731-741, concurred in by the Chief Justice and Justice Reed.

[5] Opinion of Justice Frankfurter, 332 U.S. 727-731, concurred in by Justice Jackson.

On the rehearing, by agreement of counsel, the record of the original hearing was deemed part of the new proceeding. The new testimony related to many of the facts developed at the original hearing, in addition to the specific question referred to in Justice Frankfurter's opinion. We therefore summarize the general facts brought out at the combined hearings, and then discuss the new evidence on the question for which the cause was remanded.

1. The General Background

Petitioner, a German alien, was married to an instructor of German at Wayne University, a doctor of philosophy, with whom she had come to the United States in 1926 (R. 2, 48, 70; see also, Tr. 475). She had been a student for two years at Wayne University herself (Tr. 148-149). On August 24, 1943, she was arrested on a presidential warrant as a dangerous enemy alien and detained at an Immigration Detention Home (R. 48-50, 126). From August 24 to August 27, she was questioned by two agents of the Federal Bureau of Investigation, Collard and Hanaway (R. 49, 95, 121, 126-127, 143), and she gave them a signed statement relating to her associations with other defendants (R. 55, 143; see also Tr. 274-339).[6]

On September 18, 1943, a copy of the indictment here involved was handed to her, and she read it (R. 50, 90-91; see also Tr. 390).

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[6] On being questioned on the second hearing, petitioner stated that she had made no corrections in this report but later admitted that there were several changes which she had initialed (Tr. 274-280). She also admitted reading and initialing every page (Tr. 281-339).

On September 21, she and another woman defendant were brought before Judge Moinet for arraignment. The judge informed them that they were entitled to counsel, and when they said they had no money for counsel, he stated that he would appoint counsel for them (R. 51; see also Tr. 637). The court appointed an attorney at that juncture for the purpose of arraignment only. After both women indicated to him in a whispered conversation that they understood the indictment, and that they were not guilty, he advised them to stand mute, which they did, and a plea of not guilty was entered (R. 51-52, 110-112). Petitioner was then taken to the Wayne County jail with two other women defendants (R. 53).

On September 25 or 26, Okrent, an attorney who had been a pupil of petitioner's husband, and Okrent's partner, Berger, called on petitioner. They told her they had come at her husband's request and would let her husband know whether they would take the case (R. 56-57, 91-93, 114-118; see also Tr. 386-387). Their visit was "primarily to enable" Okrent to advise her husband "what steps to take" (R. 13). Evidence was adduced to show that these attorneys were with her from 2:51 p.m. to 5:45 p.m. (R. 92; see also Tr. 601-602). Although petitioner testified that she did not ask the lawyers to advise her (R. 56), on the second hearing Okrent testified that she asked him to explain the indictment (Tr. 611-612). Berger testified that they read parts of the indictment to her, and that she protested her innocence of the charges therein contained (R. 119), while Okrent testified on the second hearing that the counts of the indictment were not read to her (Tr. 605-607).

Petitioner testified that this discussion was about family affairs "entirely" (R. 93), while Berger testified that the discussion pertained to the case (R. 118-119). Although Berger indicated a reluctance to take this case (R. 116; see also Tr. 134-135), Okrent testified that he had made no decision as to whether or not he would represent her on the trial before her subsequent change of plea (Tr. 577).

Either on September 27, September 28, or October 2,[7] petitioner sent for Collard, one of the F.B.I. agents who had previously taken her statement at the time of her hearing before the Enemy Alien Board (R. 55, 140; see also Tr. 34-36). Collard, another agent, and petitioner, talked together in an office room of the jail. Collard testified that, on her copy of the indictment, several of the overt acts pertaining to petitioner were encircled, and she asked him to try and explain it to her. The following testimony given by petitioner in response to questions by her attorney was the issue on which clarification was ordered (R. 55):

> Q. Tell how he advised you and what he said.
>
> A. This is what I understood: That if there is a group of people in a "Rum" plan who violate the law, and another person is there and the person doesn't know the people who are planning the violation and doesn't know

[7] At times petitioner testified that this date was September 27 and at other times September 28 (R. 56; see also Tr. 138, 160, 367, 376, 405), while Collard testified this conversation took place on October 2, substantiating this date with his own records, prepared in 1944, indicating his jail visits (R. 140; see also Tr. 35, 534-535).

> what is going on, but still it seemed after two years this plan is carried out, in the law the man who was present becomes * * * the person nevertheless is guilty of conspiracy. And I said to Mr. Collard: "If that is the law in the United States, I don't know how I ever can prove myself innocent, and how will any judge know how am I guilty if this is the law?" * * *

On September 28, petitioner, on her own initiative, told Hanaway, another F.B.I. agent, that she would plead guilty if she would receive assurances that there would be no more publicity, that she would not be sent far away from Detroit, and that she would not be deported (R. 58, 99-100, 122; see also Tr. 367-368, 418-419). She was informed by the agent, and by Babcock, the assistant United States attorney, that they were powerless to grant these conditions. Babcock said that he would, however, recommend that she be imprisoned near home because of her family situation, but that such recommendation was not binding (R. 123-125). She was told that if she was innocent, she should not plead guilty (R. 122-125), and she should decide that for herself "on the basis of whether or not in her own conscience she had to say that she was guilty" (R. 158-159). Her husband was then called and she talked with him in the marshal's office (R. 125; see also Tr. 252). He told her not to plead guilty, that he would try and send Mr. Okrent, the lawyer, and that she should talk with him first. She agreed that she would wait for Mr. Okrent (Tr. 252, 380-382).

Petitioner again talked with her husband on October 6 (Tr. 258). She testified as follows relative to this conversation (Tr. 382):

> Q. Did you ask him why the lawyer didn't come?
>
> A. My husband asked me, was the lawyer there, because he had contacted Mr. Okrent and Mr. Okrent said he was very busy but he would try to come up and see me.

The next day, October 7, petitioner decided to disregard her husband's advice and plead guilty (R. 63-65; see also Tr. 384-385). Petitioner told the F.B.I. agents that she did not desire to discuss her case with an attorney (R. 137, 147-148, 153). She was brought before Judge Lederle (R. 65, 138-139), and while he at first demurred at accepting her plea because there had been no appearance of counsel in the case, he later accepted it, according to petitioner, when Babcock assured him that he could accept the plea (R. 66). Petitioner, after being informed of her constitutional right to counsel by Judge Lederle (R. 35), then signed a written waiver of counsel (R. 66-67), as follows (R. 36):

> I, Marianna von Moltke, being the defendant in the above entitled cause, having been advised by the Court of my right to be represented by counsel, and having been asked by the Court whether I desire counsel to be assigned by the Court, do hereby, in open court, voluntarily waive and relinquish my right to be represented by counsel at the trial of this cause.

She thereupon changed her plea of not guilty to one of guilty (R. 35). Judge Lederle asked her whether the indictment had been explained to her and she said, "Yes" (R. 67-68, 107, 139). She was asked by the court whether she pleaded guilty because she felt guilty, and she answered in the affirm-

ative (R. 68, 133). She also told the court that the plea of guilty was not upon the suggestion of any government agent (R. 133). Babcock testified that "Judge Lederle was extremely careful and meticulous to make sure, as he always does, that she understood what she was doing" (R. 160, 166).

Collard testified that the judge "went to considerable pains to ask her the questions that he should have to guarantee the rights that she had, and to convince himself * * *" (R. 139). Although she contended later that she had made a statement to Babcock that she wanted to plead guilty although she was not guilty, this was denied by Babcock and Collard (R. 138, 159). Petitioner admitted that no one threatened her or made promises to her to induce her plea of guilty (R. 99), and the agents testified that they made no threats or promises of any kind to induce her to plead guilty (R. 121, 131, 133, 136, 147).

On August 7, 1944, petitioner, through her counsel Mr. Okrent, filed a motion for leave to withdraw her plea of guilty, setting forth that at the time of her plea she was upset, that she was not represented by counsel, and that she was not guilty of the crime (R. 37). Her motion was supported by an affidavit which, though rather extensive, makes no mention of any erroneous legal advice given her by Collard (R. 38-45).[8] The motion was denied on November 16, 1944 (R. 46).

The petition for a writ of habeas corpus was filed on February 7, 1946 (R. 1-16).

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[8] On the second hearing, United States Attorney John C. Lehr testified that in her conversations with him relative to changing her plea, she made no mention of any erroneous legal advice given her prior to her change of plea (Tr. 635-636).

2. The new evidence

Collard, the F.B.I. agent whose alleged advice was in issue testified that on October 2,[9] petitioner had one of the matrons call his office and leave word that she would like to talk to him. He, with another agent, went to the jail and talked with petitioner in an office. She had a copy of the indictment on which several overt acts pertaining to her were circled, and she asked him to explain the indictment (Tr. 34-36). The explanation of conspiracy that petitioner testified, on the first hearing, had been given her by Collard, was read (Tr. 37-38). Collard was asked specifically whether he had given this explanation as follows (Tr. 38):

> Q. (By Mr. Fordell): Did you give her an illustration?
>
> The COURT: First begin with the illustration. Did you give her the illustration in the manner she has outlined you gave it to her, and if you did not, could she have arrived at that conclusion from anything you said?
>
> A. No, sir.
>
> Q. (By Mr. Fordell): You do recall giving her an illustration is that it?
>
> A. I said at the other hearing it is quite possible I gave her an illustration concerning a rum runner's case, yes, sir, but not the illustration as she said in her testimony, no, sir.

After testifying that he was a lawyer admitted to practice in Texas, and Kansas, and had practiced 3½ years before joining the F.B.I. Collard was asked (Tr. 39):

---

[9] Collard established this date, October 2, by his own records prepared in 1944 of cards indicating jail visits (Tr. 35, 534-535).

The COURT: The court would be interested, Mr. Fordell, in knowing what the illustration was he gave her, if he did give her one.

Q. (By Mr. Fordell): Do you recall the illustration that you gave her?

A. To the best of my ability now, to remember, it is quite possible while talking to Mrs. von Moltke that I used an illustration of a rum runner's case to attempt to show the general law of conspiracy. And to the best of my memory now, if I did use such case, I probably told her that where several people get together and decide among themselves to run rum across the Detroit River, and should subsequently one of those persons proceed to run some rum across the Detroit River, those persons who would be together originally agreeing to so run the rum would be guilty of conspiracy.

* * * * *

(Tr. 40-41):

The COURT: Might it have been possible for her to have been in such state of mind as to not have understood the example, that you gave?

A. I do not think so, your honor, no sir.

The COURT: She was not flustered or excited?

A. No, sir.

(Tr. 41):

The COURT: Are you sure that you made clear to her that she must have participated in the agreement?

A. Yes, sir.

The COURT: Or understanding.

A. Yes, sir.

The COURT: It didn't have to be in writing?

A. That is right, it doesn't have to be in writing.

The COURT: There is no question in your mind but what she understood what you were saying?

A. That is right, yes sir.

Q. (By Mr. Fordell): How much time was devoted by you, or taken up at this meeting with her, when you gave this explanation of the law to her?

A. I believe the record reflects there that we were there about two and a half hours.

* * * * *

(Tr. 42):

Q. (By Mr. Fordell): Was any time spent explaining the overt acts in the indictment to her?

A. Yes.

Q. You went over the overt acts?

A. Yes, sir.

* * * * *

(Tr. 42-43):

Q. In reading the record, do you recall the testimony of Mrs. von Moltke that you told her the indictment did not mean anything?

A. I remember reading that in the statement, yes, sir.

Q. Did you ever say that to her?

A. No, sir, I did not.

Q. I believe that she further stated that you told her the overt acts didn't mean anything.

A. Yes, sir, she stated that.

Q. Did you tell her that?

A. No, sir, I did not.

* * * * *

(Tr. 60):

The COURT: What was your impression? Did she seem to know what an overt act was?

A. Yes, sir.

* * * * *

(Tr. 64):

Q. (By Mr. Field): You don't remember Mrs. von Moltke telling you that the attorney that she was expecting to come to represent her had not appeared?

A. No, sir. As I remember it, Mrs. von Moltke kept telling me she didn't want an attorney.

* * * * *

(Tr. 119-120):

Q. (By Mr. Field): Will you repeat, Mr. Collard, the illustration that you used for Mrs. von Moltke at this October 2, 1943 conference?

A. Yes, sir. I testified to that this morning. Do you want me to repeat what I said this morning?

The COURT: That is what he asked for, I think.

A. As best I remember it, I told Mrs. von Moltke that if several persons discussed and agreed to run rum across the Detroit River, and subsequently, one of those parties to this original agreement did so run rum across the Detroit River, then the persons, other than himself, in the original agreement, would be guilty of a conspiracy. I don't think that is the exact language I used this morning, but as close as I can get to it now.

Q. (By Mr. Field): In other words, the difference between the illustration that Mrs. von Moltke testified to and the one that you just

gave the court is that there must be active participation by all parties to become conspirators?

A. No, sir, that isn't the difference.

Q. What is the difference?

A. I believe Mrs. von Moltke's testimony, according to the record, says that just someone seen in a room, hearing such a discussion going on, would be guilty.

Q. And so you didn't use that?

A. I very definitely don't think I used any such illustration as that, no sir.

Collard also testified that petitioner dictated a full factual statement to the F.B.I. agents at the time of the hearing before the Alien Enemy Board and prior to the indictment, setting forth her associations with the other defendants named in the various overt acts; that she read it over, made corrections in it and initialed the corrections, and then signed the statement (Tr. 528-537).

On the other hand, petitioner testified that Collard gave her the allegedly erroneous legal advice before September 28 or in other words, before she had indicated to Hanaway on September 28, that she wanted to plead guilty (Tr. 138, 160, 367, 376, 405-406). She said that she talked with her husband on September 28 (Tr. 252), and again on October 6 when he told her that Okrent, the lawyer, was busy but would try and come to see her (Tr. 258, 332). She promised on both occasions to wait for the lawyer before doing anything further (Tr. 380-382). She, however, changed her mind and again decided to plead guilty on October 7 (Tr. 384-385).

Petitioner admitted telling Hanaway on September 28 that she would plead guilty providing the conditions regarding her deportation, her confinement, and the publicity were met, and that the main idea in her mind was that Mr. Babcock and the Government expected her to cooperate by pleading guilty (Tr. 367-368).

Petitioner denied being cognizant of the fact that one of the principal conspirators was an agent of a foreign government, despite her signed inconsistent statement identified by Collard (Tr. 528-537), and despite the fact that she admitted reading, correcting, and signing the statement (Tr. 274-339). She also disavowed ever hearing or overhearing anyone plotting against the United States Government. She was asked then how the alleged example of conspiracy motivated her to plead guilty and she answered as follows:

(Tr. 415-416):

The COURT: Now, here is what you said the other day:

"He then brought that out and said if several people are in one room and plan a violation of the law, to hijack rum, and another person enters the room and they don't know—the person entering the room does not know the other people, he or she has never seen them, but happens to over listen their plan, and even after this plan is carried out, two years later, and the government becomes aware of the fact that the person at the time listening in on to their planning, the person is guilty of conspiracy under the American law."

Now, that anticipates that you must have known you overheard somebody planning

against the government, and if that is all they had to prove, then you would be guilty. So who was it that you had ever overheard planning against the government?

A. I did never overhear anybody planning against the government.

The COURT: All right. Then how could this remark of his, even if it was made just as exactly as you say, how did that urge you to plead guilty when you knew that you never even heard anybody planning to overthrow the government?

A. But I knew Miss Buchanan.

The COURT: He didn't say if you know anybody, because you have already said that two hundred fifty other people knew Miss Buchanan, and they would all be guilty of violation of the law if he told you that.

A. Mr. Collard gave me the example, and I gained from him that I was guilty, that the law would make me guilty.

The COURT: Were you guilty because you had overheard some conversation, not participated in it, but overheard some conversation? Is that why you felt; "Well, if that is true, if I don't have to participate, all I have to be is in the same room and hear you, and I did hear you," you said to yourself, "then I must be guilty?"

A. No, your Honor.

* * * * *

Petitioner admitted telling the trial court that the indictment had been explained to her at the time of her change of plea, testifying as follows (Tr. 261):

Q. (By Mr. Field): Did Judge Lederle ask you whether you understood the charge against you?

A. He asked me had the indictment been explained to me.
Q. Yes.
A. And I answered yes.

* * * * *

On July 19, 1949, the trial court again dismissed the petition for a writ of habeas corpus (Tr. 730). In a twenty-page opinion the trial court reviewed the evidence on which it based its opinion (Tr. 709-729) and pursuant to the mandate of this Court, found, on the factual issues as follows:

(Tr. 715-716):

> In any event, we are met squarely with the issue of credibility on this first question and after having heard the testimony and observed the demeanor of both the agent and Mrs. von Moltke on the stand, we have made our decision. The agent was a scrupulous witness, approaching in his honest detachment the ideal of a trained, disinterested observer. In fact his refusal to insist that he could remember the exact words passing between himself and Mrs. von Moltke more than 5 years ago during her long period of incarceration is in striking contrast to her testimony where she remembers almost everything verbatim and in our opinion lends strength to his statements. As for Mrs. von Moltke we were as impressed as evidently Judge O'Brien was that she is an intelligent, mentally acute woman. We can add that she was also artful and resourceful. This impression was borne out by her conduct on the stand, her choice of words and her grammar. We noted also her vacillation, inconsistencies, and contradictions. In our opinion she not only understood that she must overhear the plotters but in

addition that she must have acquiesced and participated in the illegal scheme, and that some one of the plotters must have committed an overt act aimed to carry out the conspiracy.

We have no hesitancy in resolving the fact issues in favor of the agent. We believe him.[10]

This judgment was affirmed on April 6, 1951, by the Court of Appeals for the Sixth Circuit (Tr. 752). Judge McAllister wrote a dissenting opinion (see appendix to the trial transcript of the second hearing), which petitioner adopts as her brief in support of her petition for certiorari (Pet. 8).

ARGUMENT

In accordance with the mandate of this Court, the factual issue of whether petitioner was induced to waive her right to counsel and plead guilty in reliance on erroneous legal advice of a lawyer-agent was the subject of further proceedings in the District Court. That court, on the basis of extended testimony of witnesses, particularly on the further testimony of the lawyer-agent Collard, and petitioner herself, resolved the issue of fact against petitioner. Collard unequivocally denied giving her the erroneous advice. While he did not repeat verbatim the contents of a conversation of several hours' duration, which had taken place years before (a fact which, as the trial court observed, lends strength to his testimony), he did remember that he, as a trained lawyer, did not give the

[10] The trial court also found, *inter alia* that petitioner was aware of her right to counsel (Tr. 716-719), that petitioner was apprised of a possible death penalty (Tr. 719-721), and that she was aware of the presumption of innocence rule (Tr. 721-722).

patently erroneous illustration which she quoted. He did remember defining conspiracy to the best of his ability, and reading the overt acts of the indictment to her. He remembered that he made it clear to petitioner that she must have participated in the agreement or understanding to have been implicated in a conspiracy. If the trier of fact believed Collard's testimony, he was compelled to disbelieve petitioner's.

The judges on both hearings found petitioner to be "an intelligent, mentally acute woman" who was "artful and resourceful." She was the wife of a university instructor, and had herself attended Wayne University for two years. She had come to the United States in 1926 with her husband and had applied for naturalization, which was pending at the time of her conviction. It is highly significant that the contention that her waiver of counsel and plea of guilty were influenced by erroneous legal advice of the lawyer-agent Collard, was not raised at the time she filed a motion for leave to withdraw her plea of guilty on August 7, 1944. Even though her affidavit, filed in support of that motion was extensive, no mention was made of such erroneous advice given her prior to her change of plea (see R. 38-45). This omission caused the trial court to remark (Tr. 362):

> She may have told him [Mr. Okrent, her lawyer]. There may have been some reason why he left it out, I don't know, but certainly if it isn't in there, it is very material that on one occasion she says that the reason she pled guilty was because she was misinformed as to her rights, and on another occasion she pleads guilty because she was afraid if she

> didn't plead guilty her husband might become involved. That is two entirely different reasons.

She testified on the second hearing that she told Mr. Hanaway, an agent, on September 28 that she wanted to plead guilty providing the conditions regarding her deportation, confinement, and the publicity, were met, because she wanted "to cooperate" (Tr. 367-368). Later she testified that she did not plead guilty to cooperate (Tr. 418), and that when she pleaded guilty she did not expect any consideration (Tr. 410).

It is also significant that on the second hearing she stated that she had not overheard any one planning against the Government, and that the alleged illustration of the law of conspiracy given her by Collard did not, because of any similarity to her own case, cause her to plead guilty in reliance thereon (Tr. 415-416).

Petitioner furthermore stated that even after having read the indictment she felt innocent—"definitely so"—of the charges contained in it. And although she protested that she did not know what the charges were, she stated she knew she was accused of something of which she was not guilty (R. 90-91). Even after talking with Collard, she stated she felt innocent of the charges (R. 91). This testimony is certainly inconsistent with her assertion that she was informed and believed that a mere overhearing of one plotting against the Government would implicate her in a crime.

The testimony of petitioner is replete with inconsistencies. Although she admitted signing a

complete statement for the F.B.I. agents setting forth her associations with various defendants mentioned in the overt acts, and initialing her own corrections therein, her explanations of such statements when questioned about them on the second hearing are highly dubious (Tr. 281-339). Although she stated that the visit of Okrent, and his law partner, Berger, was concerned with family affairs "entirely," the lawyers admitted talking over the case with her, and Berger admitted reading the indictment to her and conducting a sort of "cross-questioning" with her.

2. If Collard's testimony is believed, his conversation with her, which she now contends involved the erroneous legal advice, occurred on October 2, 1943. This date he substantiates with his own records of jail visits (Tr. 35, 534, 535). By October 2, petitioner had already decided to plead guilty, and had indicated her intent to Hanaway to plead guilty in order "to cooperate" providing she would receive assurances that there would be no more publicity, that she would not be sent far away from Detroit, and that she would not be deported (R. 58, 99-100, 122; see also Tr. 367-368, 418-419). At this juncture, she was dissuaded by her husband who warned her to wait for Okrent, the lawyer. In fact she was visited by her husband the day before she pleaded guilty, when he told her that Okrent was busy but would try to come up to see her (Tr. 258, 382). Okrent furthermore had made no decision not to represent her at the time she pleaded guilty (Tr. 577). There was evidence that she did not even want to discuss her case with an attorney (R. 137, 147-148, 153).

3. The only issue now involved is whether there is an absence of probative facts to support the conclusion reached by the trial court that petitioner did not waive her right to counsel and plead guilty in reliance on erroneous legal advice of a lawyer-agent.[11]

A specific finding of fact was made by the trial court that no such erroneous advice was given her and this finding is documented by references to the lengthy transcript of the second hearing wherein that point was the specific issue litigated. The minimum of probative proof essential to sustain the trial court's finding was far exceeded in this record and no justification remains for reweighing the evidence, and reappraising the credibility of witnesses. Cf. *District of Columbia* v. *Pace*, 320 U.S. 698, 701. The issue of credibility is one for the trier of facts,[12] and the trial court's impartial observation of witnesses should not be dissipated in the process of review.[13] The dead page of a record cannot recreate a "tone of voice or the gloss that personality puts upon speech," [14] or convey to a reader the demeanor, or the nuances of expression, or the intonations of the speaker. The decision of the trial court has been affirmed by the court of appeals. This Court will not ordinarily review factual findings, particularly where concurred in by the two lower courts,[15] and where there is no reason to doubt their correctness.

---

[11] Cf. *Lavender* v. *Kurn*, 327 U.S. 645, 653.

[12] *Hawk* v. *Olson*, 326 U.S. 271, 277.

[13] *Von Moltke* v. *Gillies* (opinion of Mr. Justice Burton, 332 U.S. 708, 740).

[14] Id. (opinion of Mr. Justice Frankfurter, p. 730).

[15] *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275, and cases cited.

Petitioner, adopting the dissenting opinion below, in effect urges that this Court should disbelieve Collard, and believe petitioner. Occasions are cited, when after the passage of years, Collard could not remember the exact phraseology of isolated bits of a conversation which lasted several hours. These illustrations merely go to the issue of credibility, and even, as the trial court held, reinforce the conclusion that Collard was telling the truth. Collard unequivocally denied giving the illustration that is the gist of the present consideration and the trial court believed him, not alone on the basis of his words set down in black and white, but also on the basis of visual impressions that can never be so reproduced.

Furthermore, the trial court did not believe petitioner, and such disbelief itself is based on substantial evidence of inconsistencies and improbabilities in her testimony and the testimony of her witnesses. She had the burden of proving her case by a preponderance of the evidence, and the burden remained with her when the case was remanded. The trial judge did not believe her story, saying (Tr. 728): "This court is convinced that Mrs. von Moltke knew more about conspiracy, the essentials thereof and the possible penalty in her case, than many a lawyer. * * *"

The trial court has meticulously complied with the mandate of this Court. The facts upon which its opinion is based should not again be reweighed and the credibility of witnesses reappraised.

CONCLUSION

We respectfully submit that the judgment below was correct and the petition for certiorari should be denied.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 78

MARIANNA VON MOLTKE,

Petitioner,

v.

A. BLAKE GILLIES, SUPERINTENDENT OF THE DETROIT HOUSE OF CORRECTION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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Opinions Below

The opinion of the District Court on the first hearing (R. 170-174) [1] is reported at 72 F. Supp. 994. The majority and dissenting opinions in the Court of Appeals on the first

[1] "R." refers to the printed record on the first hearing, "Tr." to the transcript on the second hearing which has not been printed. By stipulation of counsel at the second hearing (Tr. 17) all testimony and other records in the original proceeding could be considered as a part of the proceedings in the rehearing on remand.

appeal are reported at 161 F. 2d 113. The opinion of this Court is reported at 332 U. S. 708. The second opinion of the District Court (Tr. 709-729) is not reported. The majority and dissenting opinions in the Court of Appeals on the second hearing are reported at 189 F. 2d 56.

Jurisdiction

The judgment of the Court of Appeals was entered April 6, 1951 (Tr. 752). The petition for writ of certiorari was filed May 28, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Did petitioner competently, intelligently, and with full understanding of the implications, including the possible imposition of a sentence of death, waive her constitutional right to counsel and plead guilty to a capital crime?

2. Was petitioner given misleading erroneous legal advice by F.B.I. Agent Collard, acting as a member of the prosecution, whereby she was induced to plead guilty believing that a defense to the charge against her was useless and that her only hope was the mercy of the court?

3. Are the District Court's findings that petitioner was not misled by erroneous advice given her by F.B.I. Agent Collard and that she pleaded guilty to a capital crime with full knowledge of her constitutional rights to the assistance of counsel and trial supported by substantial evidence?

Statement of the Case

The second appearance of this case here is the result of the decision of this Court in *von Moltke* v. *Gillies*, 332 U. S. 708 remanding the cause to the District Court to hold further hearings and to give consideration to and make explicit findings on the questions of fact discussed in the separate opin-

ion of Mr. Justice Frankfurter (332 U. S. 727), and that "If upon such further hearings the District Court finds that the petitioner did not competently, intelligently, and with full understanding of the implications, waive her constitutional right to counsel, an order should be entered directing that she be released from further custody under the judgment based on her plea."

The separate opinion of Mr. Justice Frankfurter (in which Mr. Justice Jackson joined) presents the following issue (332 U.S. 727):

> "The appropriate disposition of this case turns for me on the truth of petitioner's allegation that she was advised by an F.B.I. Agent, active in the case, that one who merely associated, however innocently, with persons who were parties to a criminal conspiracy was equally guilty."

Mr. Justice Frankfurter stated that the agent's testimony "suggests a scrupulous witness" but added that the agent, as a symbol of the prosecution, "owed it to an accused in petitioner's position to give her accurate guidance, if he gave her any" (332 U.S. 730), and concluded that he would send the case back to the District Court "for further proceedings with a view to a specific finding of fact regarding the conversation between petitioner and the F.B.I. agent *with as close a recreation of the incident as is now possible*" (332 U.S. 731: emphasis added).

Due to the death of District Judge Ernest A. O'Brien who presided at the original hearing, the rehearing on remand was assigned to District Judge Frank A. Picard. Hearings were held March 10, 15, 16, 17 and 29, 1949. Besides petitioner and F.B.I. Agent E. Bert Collard, Jr., several witnesses who did not appear at the original hear-

ing testified, including petitioner's husband (Tr. 474-528), Harry Okrent, one of the two attorneys who had visited petitioner at the county jail (R. 120: Tr. 568-614), John C. Lehr, United States District Attorney in 1943 and 1944 (Tr. 623-666), W. Ellis Meehan and Robert Heystek, F.B.I. agents who sought to impeach Okrent's testimony (Tr. 667-672). Aubrey Benson testified concerning records of visits at the county jail (Tr. 619-623) and Edwin W. Scott identified and testified as to the contents of a newspaper article written by him which appeared in the Detroit Times March 18, 1944 and which bore the headline "MRS. VON MOLTKE SEEKS JURY TRIAL" (Tr. 678-685).

F.B.I. Agent Charles T. Hanaway, who testified at the original hearing (R. 129) that he was present when Collard explained the indictment to petitioner, was present in the courtroom at the second hearing but was not called by the Government as a witness (Tr. 157-159). F.B.I. Agent James H. Kirby who testified at the original hearing (R. 131-134) was also present in court during the second hearing (Tr. 169) but was not called as a witness.

Following the second hearing, the District Judge filed a written opinion holding that the petition for writ of habeas corpus be dismissed and the writ discharged (Tr. 709-729). An order to that effect was entered (Tr. 730).

In the opinion filed, the District Judge quoted the first paragraph of Mr. Justice Frankfurter's separate opinion as to the scope of the inquiry on rehearing (332 U.S. 727) but stated (Tr. 710):

> "Nevertheless we are not confining our decision to this narrow scope but will endeavor to decide all contentions advanced by petitioner, even though some of these are of recent origin or were evidently not impressive enough to require decision by our highest tribunal."

The contentions referred to were (Tr. 710):

(a) That although petitioner was originally informed while being held under presidential warrant that she was not entitled to counsel, she was not advised of her constitutional right to counsel after being indicted.

(b) That petitioner was not advised that the crime to which she pleaded guilty carried a possible death penalty.

(c) That prior to pleading guilty petitioner did not know of the presumption of innocence and believed that the burden was on her to prove her innocence of the charge against her.

On the precise issue raised in the separate opinion, the District Judge held that he resolved it on the basis of the credibility of petitioner and Collard (Tr. 715, 716). The District Judge stated (Tr. 716): "We have no hesitancy in resolving the fact issues in favor of the agent. We believe him."

All other issues, including those referred to above, were determined against petitioner (Tr. 716-723). With respect to the difficulty of a laymen comprehending the implications of the crime of conspiracy, the District Judge stated (Tr. 728): "This court is convinced that Mrs. von Moltke knew more about conspiracy, the essentials thereof and the possible penalty in her case, than many a lawyer."

General Background

It is believed that the opinion of Mr. Justice Black and Mr. Justice Frankfurter in von Moltke v. Gillies, 332 U.S. 708-731, sufficiently present the background material necessary for a consideration of the questions presented on this appeal. The facts and circumstances therein set forth are therefore not repeated here and are respectfully incorporated in this brief by reference thereto. Except as

otherwise indicated, the emphasis in this brief will be upon the evidence and proofs introduced at the second hearing.

The New Evidence

On the second hearing, Collard, called as a witness by the Government, testified that while awaiting trial in the county jail, petitioner was appealing to every F.B.I. agent who visited the jail to explain the indictment to her, and that finally she sent word through one of the jail matrons that she wanted to see him. In response to this request, he went to the jail to see her (Tr. 34). According to Collard's personal records, this occurred on October 2, 1943 (Tr. 35).[2] On this visit Collard was accompanied by Agent Hanaway (Tr. 36, 41). The conference took place in the matron's office on the fifth floor of the jail (Tr. 36) and lasted several hours (Tr. 41). Petitioner had a copy of the indictment and asked Collard to explain it to her. He undertook to do so (Tr. 38). At this point the Government attorney read to Collard the "rum runner" illustration petitioner had testified to on the first hearing (Tr. 37) and the following occurred (Tr. 38-41: emphasis supplied):

> Q. Did you give her that advice?
>
> A. *As a lawyer,* I couldn't have given her that illustration of a rum runner.[3]

---

[2] Petitioner testified she thought the date was before September 28, 1943 (Tr. 376) but kept no record of the date. On the original hearing she testified that the conversation with Collard occurred: "approximately * * * the 27th of September. That is what I recall. I might be mistaken" (R. 56). On the first hearing Collard was also not certain of the date (R. 141). Under either version, the conference took place before October 7, 1943, the date petitioner pleaded guilty to the indictment (R. 35 and see Tr. 102).

[3] The following language from Mr. Justice Frankfurter's opinion is to be noted (332 U.S. 730):

> He (Collard) did not even suggest that even though he did not remember, he was confident that he could not have given her the kind of misleading information she attributed to him.

The Court: Did you or didn't you?

By Mr. Fordell:

Q. Did you give her an illustration?

The Court: First begin with the illustration. Did you give her the illustration in the manner she has outlined you gave it to her, *and if you did not, could she have arrived at that conclusion from anything you said?*

A. No, sir.

By Mr. Fordell:

Q. You do recall giving her an illustration, is that it?

A. I said at the other hearing that it is quite possible I gave her an illustration concerning a rum runner's case, yes, sir, but not the illustration as she said in her testimony, no, sir.

• • • • • • •

The Court: The court would be interested, Mr. Fordell, in knowing what the illustration was he gave her, *if he did give her one.*

By Mr. Fordell:

Q. Do you recall the illustration that you gave her?

A. To the best of my ability now, to remember, *it is quite possible* while talking to Mrs. von Moltke that I used an illustration of a rum runner's case to attempt to show the general law of conspiracy. And to the best of my memory now, *if I did use such a case,* I probably told her that where several people get together and decide among themselves to run rum across the Detroit River, and should subsequently one of those persons proceed to run some rum across the Detroit River, those persons who would be together originally would be guilty of a conspiracy.

The Court: That wouldn't be exactly true either, would it, Mr. Fordell?

Mr. Fordell: It is the general law that if two people agree to violate a law and one commits an overt act to carry out the agreement, both are guilty.

The Court: Yes, if one of the does anything to carry it out.

Mr. Fordell: That is right.

A. *That is what I meant to say.*

The Court: That is, it is possible for one to withdraw from a conspiracy—I will have to read that. In other words, according to her statement she had the idea if she happened to be in the room where some people conspired, and two years afterwards if they did something, the fact that she was in the room would be sufficient to convict her. Did you ever give her such information?

A. No, sir. That I definitely did not give her, no, sir.

The Court: *That wouldn't be anywhere near the law, would it?*

A. *No, sir, it would not be.*

The Court: *And there has to be an agreement in a conspiracy, and one person must do an overt act?*

A. That is right.

The Court: And if one person does an overt act then those who have agreed to the conspiracy are all liable?

A. Yes, sir.

The Court: *That is what you think you told her?*

A. Yes, sir.

The Court: Would it have been possible for her, do you think, under the circumstances, being in jail, and apparently friendless, the nation she had come from at war with the United States * * * Might it have been possible for her to have been in such a state of mind as not to have understood the example, that you gave?

A. I do not think so, your Honor, no sir.

The Court: She was not flustered or excited?[4]

---

[4] During the examination of Harry Okrent, who visited petitioner at the jail a few days prior to Collard's conference with her regarding the indictment, the District Judge stated that he would take judicial notice

A. No, sir.

The Court: She was there alone?

A. Another agent was with me.

The Court: Who was the other agent?

A. Charles T. Hanaway.

The Court: *Of course, in giving any kind of illustration you didn't go into all the details and possibilities?*

A. No.

The Court: *Are you sure that you made clear to her that she must have participated in the agreement?*

A. Yes, sir.

The Court: Or understanding?

A. Yes, sir.

The Court: It didn't have to be in writing?

A. That is right, it didn't have to be in writing.

The Court: *There is no question in your mind but what she understood what you are saying?*

A. That is right, yes, sir.

On cross examination Collard stated that he discussed the five overt acts in which petitioner's name appeared with petitioner at the jail during the conference about the indictment, and that the incidents incorporated into the overt acts had also been discussed with petitioner during the four days she was interrogated by him and Hanaway following petitioner's arrest on presidential warrant (Tr. 55-59). Collard stated that he tried to explain the meaning of the overt acts to petitioner, but that he did not know "whether you would say we had any difficulty or not" whereupon he was questioned by the Court as follows (Tr. 60, 61):

The Court: What was your impression? Did she seem to know what an overt act was?

A. Yes, sir.

The Court: All right. That is all you have to answer.

---

that petitioner, who had never been in jail before, would be nervous (Tr. 572). Later in his testimony Collard stated that he could not remember whether petitioner was tense and excited when he explained the indictment to her (Tr. 66).

A. All right, sir.
The Court. After you got through explaining it?
A. Yes, sir.

By Mr. Field:

Q. What did you explain to Mrs. von Moltke was the nature of an overt act?
A. An overt act as an actual—You want me to give the legal definition of an overt act?
The Court: *What did you say to her, in a general way, if you can remember?*
A. As best I remember, I *probably* just told her the overt act was the actual carrying out. It is hard to say just what I said six years ago.
The Court: You started to say what *you thought you said to her.*
A. Undoubtedly, I tried to tell her it was an actual commission of some particular act, an actual doing of some particular thing.

Asked whether he explained to petitioner that the overt acts could have been innocent on her part, Collard answered "I am afraid I just can't answer that question" (Tr. 61). He stated he could not remember whether petitioner told him she had never been in Grosse Pointe, Michigan (Tr. 63) as charged in overt act XXXI (R. 31). Collard's testimony as to whether the incidents mentioned in the overt acts could have been innocent on the part of petitioner was as follows (Tr. 63):

By Mr. Field:

Q. Did Mrs. von Moltke ask you in connection with the overt acts whether the thing that she was charged with doing, such an introducing people to one another, and conferring with people, might not have been innocent on her part?
A. It is quite possible she did. I just can't remember.

Collard further testified on cross examination that he did not try to discuss any of the legal implications of the overt acts with petitioner (Tr. 78) and that he told her that how she pled to the indictment was strictly a matter for her "and no one else" (Tr. 80). Collard could not remember whether he told petitioner the question of pleading was a matter for her and her attorney, but his memory was that she kept telling him she did not want an attorney (Tr. 64). Collard stated that he discussed both the indictment and the charges with petitioner and when confronted with testimony to the contrary given by him on the first hearing confirmed the answer there given (Tr. 75-77).

At the original hearing Collard testified as follows on cross examination (R. 144):

> Q. And did Mrs. von Moltke ask you whether merely conferring with people who later turned out to be guilty of criminal acts would also make her a criminal, and guilty of criminal acts?
>
> A. I do not recall that particular question. It is quite possible.

Interrogated about this testimony at the first hearing, Collard testified as follows on cross examination (Tr. 88):

> A. If that is what the record says, that is what I said, yes.
>
> Q. If that is what the record says, you don't dispute it?
>
> A. I don't dispute anything in the record.
>
> Q. Then it is true?
>
> A. Yes.
>
> Q. And you did discuss that matter with Mrs. von Moltke?
>
> A. It is just like the answer says. I don't recall doing it, but it is quite possible, it could have been. Yes.
>
> Q. Is your recollection on that point any better now than it was then?

A. I hardly think so.

Q. But it is better now than it was with respect to the illustration that you used, is that right?

A. Yes, sir, because I was never asked a question before on the illustration.[5]

Collard could not recall telling petitioner after she had been served with the indictment that she was then entitled to counsel or that her right to counsel was any different after the indictment from what it was while she was held under presidential warrant (Tr. 106-108).

Interrogated on cross examination about his testimony on the first hearing that it was his belief petitioner's memory as to the rum runner illustration was better than his, Collard testified (Tr. 111):

By Mr. Field:

Q. On the first hearing in this Court you testified you believed that Mrs. von Moltke's memory was better than yours, is that correct?

A. If it is in there, yes, sir.

Q. Only if it is in there?

A. Well, if I testified at the former hearing to such a fact, I am sure it will be in the record.

The Court: No, he didn't ask you that. "Do you say that?" "What do you say now?" I think it would be better to put it in that way, don't you, Mr. Field? As to whether you think her memory is better than yours, if you said before it was, what do you say now?

A. It is every bit as good now as it was before.

---

[5] Collard was mistaken. At the original hearing he testified on cross-examination as follows (R. 142, 143):

Q. And did you during that discussion use a (sic) illustration about a rum runner?

A. Well, I heard Mrs. Von Moltke say that, and since she did I have been trying to recall, and I cannot remember such an illustration.

Q. I see.

A. *But it is quite possible that Mrs. von Moltke's memory is better than mine, and I may have used such an illustration.*

By Mr. Field:

Q. Whose?
A. Mrs. von Moltke's.

Collard further testified concerning the use of the rum runner's illustration (Tr. 111, 112):

By Mr. Field:

Q. What led you to assume that Mrs. von Moltke would understand an illustration involving rum runners?

A. I can't answer that question now, Mr. Field.

Q. Did Mrs. von Moltke ever say anything to you, or indicate in any way that she was familiar with the rum running racket?

A. I don't remember that she did.

On cross examination Collard repeated the rum runners illustration as follows (Tr. 119, 120):

A. As best I remember it, I told Mrs. von Moltke that if several persons discussed and agreed to run rum across the Detroit River, and subsequently one of those parties to the original agreement did so run rum across the Detroit River, then the persons, *other than himself*,[6] in the original agreement, would be guilty of a conspiracy. I don't think that is the exact language I used this morning, but as close as I can get to it now.

By Mr. Field:

Q. In other words, the difference between the illustration that Mrs. von Moltke testified to and the one you just gave the Court is that there must be active participation by all parties to be conspirators?

A. *No, sir, that isn't the difference.*[7]

---

[6] Compare Collard's testimony on direct examination (Tr. 39). The words "other than himself" were not in the illustration there.

[7] Cf. Tr. 41:

The Court: Are you sure that you made it clear to her that she must have participated in the agreement?

A. Yes, sir.

Q. What is the difference?

A. I believe Mrs. von Moltke's testimony, according to the record, says that just someone seen in a room, *hearing such a discussion going on*, would be guilty.

Q. And so you didn't use that.

A. I very definitely *don't think* I used such illustration as that, no, sir.

Collard could not remember that he ever advised petitioner of the death penalty (Tr. 122, 428) and stated that he did not tell her of the presumption of innocence in criminal cases (Tr. 93). He could not answer whether he told her that the burden of proving guilt beyond a reasonable doubt was upon the Government (Tr. 93).

During the approximately three years Collard practiced law before joining the F.B.I., he neither handled nor assisted in the handling of any prohibition cases or cases involving a charge of conspiracy (Tr. 44, 45).

At the second hearing petitioner testified that she was never told by any Government representative that she was entitled to counsel after receiving the indictment (Tr. 129) and that when the counsel Judge Moinet promised to appoint for her "right away" after the arraignment did not appear she came to the following conclusion (Tr. 130-132):

A. I thought that there must have been some mistake in that Judge Moinet wasn't aware of the fact that I was an enemy alien, as he said he would appoint counsel for me. I was not aware of the fact that I, even as an enemy alien, enjoyed the protection of the Constitution at this time, so I thought that there would be no counsel for Mrs. Leonhardt and myself.

She testified that while held in the immigration detention home under presidential warrant she was advised by F.B.I. Agent Hove and an immigration inspector, that she had no right to counsel (Tr. 132). While in the detention home, she

was held in solitary confinement. She was not permitted to see anyone or even speak to anyone. The matron was not permitted to speak to her (Tr. 295, 296). While in the detention home she saw no newspapers (Tr. 426, 459, 460).

Petitioner testified that no one ever told her that the crime with which she was charged carried a possible death penalty (Tr. 262), and that she had never seen or read articles published in Detroit newspapers on September 17 and 18, 1943 concerning the case which mentioned the death penalty (Tr. 437-441). On the dates mentioned she was in the detention home and saw no newspapers (Tr. 459, 460).

Petitioner understood that under American law, if a person is arrested he is looked upon as guilty and required to prove himself innocent. She testified (Tr. 155):

> Q. And did you tell Mr. Collard that?
>
> A. Yes. I said, "If the American law is such that a person by merely being with somebody, or knowing somebody, becomes guilty, how could I ever prove myself innocent, because whether or not I knew anything, or if I deny it, people have to take my word, but I can't prove it, I cannot prove myself innocent."

Petitioner did not learn of the presumption of innocence until approximately three months after her plea of guilty. She testified that she learned about it from F.B.I. Agent Dunham on January 18, 1944 (Tr. 156).

Among the F.B.I. agents who came to the county jail was Agent Kirby who testified at the first hearing (R. 131-134) and who was present in court at the second hearing (Tr. 169) but did not take the stand. After learning through Kirby that her co-defendants would plead guilty within a week, petitioner inquired whether, if all the other defendants pled guilty, she would be entitled to a trial (R. 85, 134; Tr. 165-169), and was told by Kirby that the question of trial would rest with the district attorney.

After indictment and while in the county jail, petitioner appealed to F.B.I. Agents Hanaway, Kirby and Dunham to explain the indictment to her (Tr. 136). All refused, Hanaway stating that he was not a criminal lawyer. Collard, however, she testified, had encouraged her to call upon him for help and had told her he had been a lawyer in Texas (Tr. 137) and that she understood he had been connected with a conspiracy case there as assistant prosecutor (Tr. 152, 153). She testified that Collard had previously told her that "The F.B.I. is not a prosecuting agency. The F.B.I. is an investigating body, and they are as much interested to collect the evidence of innocence as they are supposed to bring the facts of guilt" (Tr. 135). Attorneys Okrent and Berger had visited her at the jail, but she understood that they refused to represent her, and had warned that they would feel free to disclose to the Government any information she might give them (Tr. 134, 135).

Petitioner sent word through a jail matron that she would like to see Collard. He arrived and explained the indictment to her (Tr. 138-163). Petitioner told Collard that she could not understand why the five overt acts naming her were in the indictment when she thought she had explained them satisfactorily to Collard and Hanaway during their four day examination of her following her arrest and to District Attorney Lehr at the Enemy Alien Hearing Board (Tr. 139-141). Petitioner testified that she told Collard that if he believed she told the truth in her statement to the F. B. I., ". . . then you know that those five overt acts are not true, because I am accused of something which I have explained, and you know very well from my statement [7a] that I am not guilty of those" (Tr. 150, 151) and that thereupon

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[7a] See Exhibit 1, written statement prepared by F.B.I. from information given Agents Hanaway and Collard by petitioner during the four day examination (Tr. 145, 178, 528).

Collard said "But you knew Miss Buchanan Dineen" [8] and advised her that the overt acts were not the important part of the indictment; that the important part of the indictment was the conspiracy (Tr. 151).

Petitioner's version of the rum runner illustration at the second hearing was as follows (Tr. 153, 154):

> Mr. Collard then explained the nature of business of a rum runner, and then he brought that out and said if several people are in one room and plan violation of the law, to hijack rum, and another person enters the room, and they don't know—the person entering the room does not know the other people, he or she has never seen them, *but happens to over listen their plan*,[9] and even after this plan is carried out, two years later, and the government becomes aware of the fact that the person at the time listening in to their planning, the person is guilty of conspiracy under the American law. That it was I understood Mr. Collard explained to me. And that was the result of my statement if I knew Miss Buchanan Dineen, two hundred and fifty other people knew her too.[10] That brought Mr. Collard up to show me that if a person, even if you had nothing to do with that person, only by being in a room, or listen to them, that under the American law you can become guilty of conspiracy.

Petitioner understood that under the law she would be presumed guilty and told Collard that under the illustration given she would not be able to prove herself innocent (Tr.

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[8] One of the defendants named in the indictment (R. 20-34).

[9] On the first hearing petitioner's testimony as to the illustration used did not specifically mention the fact that the plan to violate the law was overheard by the person present in the room. However, it was so understood by Collard in his testimony at the second hearing (he testified before petitioner did) as follows (Tr. 120):

> I believe Mrs. von Moltke's testimony, according to the record, says that just someone seen in a room, *hearing such a discussion going on*, would be guilty.

[10] Cf. Tr. 151.

155). She asked Collard if she was guilty under the American law and was brought into court to be sentenced how the judge know the facts, and Collard told her about the probation department (Tr. 156).

Petitioner stated that after this conference with Collard, she concluded that she had no chance before the law to prove herself innocent and that there was no way out but to plead guilty (Tr. 162). She felt helpless and that a trial would be useless (Tr. 174, 175).

Following the conference with Collard, petitioner endeavored to learn whether she would be given any consideration if she pled guilty and to that end requested Agent Hanaway to find out for her whether the publicity could be stopped, whether she could avoid deportation and if she could be sent to a nearby prison (Tr. 365-369). Neither the agent nor Babcock, the assistant district attorney with whom the matter was discussed made her any promises whatsoever (Tr. 379). Petitioner testified that she did not then decide to plead guilty but requested permission to talk to her husband, who was brought over to the Federal Building by one of the agents (Tr. 365, 381). Petitioner's husband told her not to plead guilty; that he would try to get Okrent to come over to see her (Tr. 381). Petitioner waited for him, but Okrent did not come (Tr. 382, 383).

Following this, petitioner heard a rumor at the jail that unless she "fell in line" and pleaded guilty, her husband would be arrested (Tr. 255). Greatly alarmed, petitioner asked to see Collard and when he arrived she repeated the rumor she had heard and asked him if it was true. Collard told her that he could not answer her question.[11]

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[11] Collard did not deny this testimony. He did testify that he did not tell petitioner that unless petitioner fell in line, her husband might be arrested (Tr. 257) but petitioner did not testify that he made the statement. Her testimony was that when she repeated the rumor and asked Collard whether it was true, he stated that he could not answer the question (Tr. 256).

Petitioner testified that what finally caused her to disregard her husband's advice and plead guilty was Collard's statement that he could not answer her question about the rumor referred to (Tr. 383-385). She placed great confidence in Collard because he was friendly and although he represented the Government, had assured her that the F.B.I. was equally interested in finding facts in her favor (Tr. 394). Petitioner stated that she did not believe Theresa Behrens, her cell mate, who told her that her husband would be arrested unless she (petitioner) pled guilty, but that she wanted to find out from Mr. Collard whether the rumor was true (Tr. 304).

After pleading guilty on October 7, 1943, petitioner learned that she had a right to withdraw the plea and have a trial (Tr. 265). Agents Collard and Hove confirmed this information and advised her to have the jail matron contact the marshal's office and arrange for her to be taken before Judge Moinet (Tr. 266). Petitioner had an interview with United States District Attorney Lehr on January 18 or 20, 1944 and advised him of her desire to withdraw her plea (Tr. 267). Lehr asked her to wait two weeks and that he would go over the statements she had given the F.B.I. and the one she had made before the Enemy Alien Hearing Board. Later Lehr asked her to wait until the Thomas trial then in progress was completed (Tr. 267). On March 24, 1944 petitioner met Lehr and Collard in the former's office. At that time petitioner discussed certain changes she wanted to make in the statement she had given the F.B.I. and also the matter of withdrawing her plea of guilty (Tr. 268). Lehr promised to take her before Judge Moinet within a few days, but did not do so until June 30, 1944. Petitioner testified that she was not permitted to address the court and that Lehr informed Judge Moinet of petitioner's desire to withdraw her plea.

(Tr. 269). After some delay, Okrent was appointed to represent petitioner for the sole purpose of filing a motion for leave to withdraw her plea of guilty (Tr. 270). Petitioner testified that no one advised her of the 10 day rule then in effect (Rule II(4) Criminal Appeals Rules of 1933). The motion was filed August 7, 1944 (R. 37), but not heard until November 14, 1944 on which date, without the taking of any testimony, it was denied (R. 46: Tr. 592, 593). Lehr appeared for the Government in opposition to the motion (Tr. 593). Immediately following denial of the motion, petitioner was sentenced to four years imprisonment (R. 8, 9).

Petitioner's husband, Heinrich von Moltke, a naturalized citizen (Tr. 476), lost his position as instructor at Wayne University when petitioner was arrested and after some delay obtained a job as clerk in a department store at $23 a week (Tr. 479). He found a place for the diabetic child and took care of the other children.

On September 28, 1943 he was called to the Federal Building in Detroit by F.B.I. Agent Dunham. When he arrived there he found petitioner nervous, excited and depressed (Tr. 480). He testified, "She told me that she did not know what to do. After her case was explained to her by agents, she did not know what to do." He told petitioner that he would try to get Okrent to see her (Tr. 482). After pleading guilty, petitioner told him she had made a grave mistake and that she had found out she had a right to withdraw the plea and would contact the federal agents at once to advise them of her intention to withdraw the plea (Tr. 484, 485). Petitioner's husband was not present when his wife was sentenced; he was not notified (Tr. 486).

Heinrich von Moltke testified that he had no money to retain an attorney for petitioner (Tr. 497) and that his

efforts to secure counsel for her were unsuccessful (Tr. 497). Okrent and Berger refused to take the case (Tr. 507). He testified that under German law the burden of proving innocence is on the person accused of crime (Tr. 515) and that petitioner was under the belief that such was the law in the United States and that this belief was "a great burden on her mind" (Tr. 499). He did not discuss the death penalty with petitioner, and did not read about the death penalty in the newspapers, stating that he had few opportunities to read as he had to take care of the house and sick child (Tr. 487). He knew that in the United States persons accused of crime had a right to counsel and to trial (Tr. 491); that he tried to get counsel for petitioner, and that she wanted counsel (Tr. 492, 493) and never told him she did not (Tr. 508).

Harry Okrent met Heinrich von Moltke in September, 1930 at Wayne University. Okrent was a student in his class in German (Tr. 568). Okrent went to see petitioner at the county jail at the request of her husband (Tr. 569). He was accompanied by Isadore Berger, his law associate. Okrent found petitioner to be in a very nervous condition; she wrung her fingers, was flushed and trembling and her speech was disjointed to a marked degree (Tr. 574). Neither Okrent nor Berger advised petitioner of the charges, her rights or possible defenses. They gave her no advice (Tr. 376). Petitioner told them of Judge Moinet's promise to send an attorney to her and mentioned that no attorney had appeared. She asked them when she might expect the attorney to come, but they declined to answer (Tr. 578). Though they knew that the crime with which petitioner was charged carried a possible death penalty, they did not discuss that matter with her (Tr. 582). Petitioner asked them whether she would plead guilty or not guilty. Okrent refused to advise her and told her to solve that

problem herself (Tr. 598). The following occurred (Tr. 599):

> The Court: Don't you think she was competent to tell whether she was guilty or not, without some advice as to whether to plead guilty?
>
> A. If you are asking my opinion, your Honor, I don't think so.

Okrent confirmed Berger's testimony on the first hearing that petitioner was warned that they would not be bound to hold anything she said in confidence; that they would feel free to disclose to the Government any information disclosed by her they might think the Government should know (Tr. 610).

Okrent saw petitioner at the county jail in January or February, 1944 after her plea of guilty. At that time he advised her of the presumption of innocence, the burden of proof in criminal cases and things of that nature, and testified that petitioner expressed surprise and told him that she thought the presumption was the other way: that the accused had to prove innocence (Tr. 586-589). The following occurred (Tr. 590-591):

> The Court: Were you rather surprised when you found out that she was under the impression that a person is presumed to be guilty in this country? Were you rather surprised when you found that out?
>
> A. Mildly.
>
> The Court: Just mildly?
>
> A. Just mildly. I am over the stage of being surprised at what any layman's conclusions about the law might be.
>
> The Court: I see. And yet this person could have been put to death and you were just mildly surprised that a woman had pled guilty, believing that she was presumed to be guilty; and you had been practicing law for seven years?
>
> A. That is correct, your Honor.

Okrent was appointed attorney for petitioner by Judge Moinet for the purpose of making a motion for leave to withdraw her plea of guilty (Tr. 586). The court calendar shows that the order of appointment was made August 2, 1944, that Okrent filed a special appearance on the same date; that the motion for leave to withdraw the plea of guilty was filed August 8, 1944 and was noticed for hearing August 14. It was heard on November 15, 1944 and denied without the taking of any testimony (Tr. 593).

Special Agents of the F.B.I. W. Ellis Meehan and Robert Heystek, testifying for the Government, stated that they interviewed Okrent in 1948 for the purpose of inquiring about the rum runners illustration and that Okrent told them he thought petitioner got a raw deal, that in his opinion there had been a miscarriage of justice, and that he would do anything he could to help her (Tr. 667-672). Neither of the agents made any notes or record of the conference with Okrent.

John C. Lehr who was United States District Attorney in 1943 and 1944, saw petitioner three or four times in 1944, the first time in January 1944 (Tr. 624). She came to see him at her request and discussed the possibility of changing her plea of guilty. Lehr told her she would have to wait until the Thomas trial was completed (Tr. 625). The *Thomas* case was concluded the latter part of February (Tr. 626). Petitioner also sent word to Lehr that she would like to go over the statement she gave the F.B.I. and requested that Collard also be present (Tr. 626). Lehr testified that petitioner felt there were inaccuracies in the statement, and that she stated that some things in the statement were not "just exactly" right (Tr. 629). Lehr arranged for Collard to be present and on March 24, 1944 petitioner was in Lehr's office and went over the statement with him and Collard for about three hours (Tr. 628). Lehr

stated that petitioner never told him she was not guilty (Tr. 632) and that she was undecided and wavered about changing her plea (Tr. 632, 633, 651). Lehr stated that petitioner was also trying to find out whether she would be deported if she pleaded guilty [12] and things of that kind, but that she did not make that a condition of her plea (Tr. 631). Asked on cross examination whether petitioner had not told him that she had pleaded guilty because she feared that unless she did her husband would be arrested, Lehr answered in the negative but when confronted with his own affidavit filed in connection with the motion to withdraw the plea of guilty in which he deposed that petitioner had so advised him, Lehr was able to recall the incident as well as the time the statement was made to him (Tr. 649, 650). On direct examination, Lehr testified as follows (Tr. 637, 638):

> Q. Did she ever claim she had understood at the time of the entry of her plea of guilty that in this country you are presumed to be guilty instead of innocent? Did she ever make that claim to you before this petition for writ of Habeas Corpus was filed?
>
> A. I am inclined to think something was said, although I can't say that definitely, although I think she said something about it, although there is so much in these different petitions that I am rather confused in mind.
>
> • • • • • • •
>
> A. • • • There is something in my mind about this presumption of guilt, or presumption of innocence, but I don't know whether I have it a little bit confused with these petitions that have been filed, or not; I can't say that.

Shown petitioner's exhibit 2 (Tr. 663, 666), being a photostatic copy of an article which appeared on the front page

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[12] The record shows, however, that Lehr did not talk with petitioner until *after* she had pleaded guilty (Tr. 624).

of the March 18, 1944 issue of the Detroit Times headlined "MRS. VON MOLTKE SEEKS JURY TRIAL" (Tr. 678), Lehr testified that he assumed that he had read the article (Tr. 663) and admitted that he might have made the statement attributed to him in the press that "we have an open and shut case against these people" (Tr. 641). He stated that he would not say that the statement referred to was a misquotation (see exhibit 3, Tr. 437-440).

Although Lehr testified that petitioner wavered as to changing her plea, he also stated that she was questioning it and wanted to talk about it (Tr. 663). Lehr stated that he gave petitioner no advice (Tr. 665). He testified that he considered it intelligent for petitioner to plead guilty if she knew she was guilty (Tr. 661) even though his testimony confirmed in some particulars that petitioner was mistaken about the presumption of innocence, believing that the burden was on her to exonerate herself from the charge against her (Tr. 637) and that he was advised by petitioner that her reason for pleading guilty was her fear that unless she did so her husband might be implicated (Tr. 650).

Specification of Errors

1. The Court of Appeals under the evidence and proofs herein erred in the holding that petitioner freely, competently, and with full understanding of the implications thereof waived her constitutional right to the assistance of counsel in her defense guaranteed by the Sixth Amendment, and in affirming the judgment of the District Court on that issue.

2. The Court of Appeals erred in holding that petitioner was not misled by erroneous legal advice given her by the agent of the F.B.I., presuming to act as a member of the prosecution, into pleading guilty to a capital crime without

benefit of counsel and thus deprived of her liberty without due process of law contrary to the mandate of the Fifth Amendment, and in affirming the decision of the District Court on that issue.

3. The Court of Appeals erred in holding that the decision and judgment of the District Court herein were supported by substantial evidence, and in affirming the judgment of the District Court.

ARGUMENT

Petitioner contends that the findings of the District Court upon the questions of fact discussed in the separate opinion (332 U.S. 727) are not supported by substantial evidence; that F.B.I. Agent Collard's testimony at the second hearing not only does not contradict but rather confirms petitioner's version of the incident deemed crucial in the disposition of this cause;[13] that the suggestion drawn from the record that Collard was a scrupulous witness is entirely dissipated by his testimony at the second hearing; that at the time petitioner pleaded guilty she was ignorant of the nature of the crime with which she was charged, of the fact that in the United States persons accused of crime are presumed innocent until proven guilty by evidence beyond a reasonable doubt (she thought the burden was on her to establish her innocence as was the case in Germany[14]); that petitioner was ignorant of her right to counsel and misadvised as to her right to have a trial,

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[13] At the second hearing Collard conceded that petitioner's memory (of the conference and illustration used) was "every bit as good now as it was before" (Tr. 111). At the original hearing Collard volunteered the statement "it is quite possible that Mrs. von Moltke's memory is better than mine, and that I may have used such an illustration" (R. 143).

[14] See Document No. 489, House of Representatives, 56th Congress, 2d Session, Penal Codes of France, Germany, Belgium and Japan (Reports prepared for the International Prison Commission), pp. 114-119.

and of the fact that the crime to which she plead guilty carried a possible death penalty; that she pleaded guilty notwithstanding her belief that she was innocent because of misleading and erroneous advice given her by Collard upon whom she relied for information, in ignorance of her constitutional rights and laboring under the false impression that unless she pleaded guilty her husband would be implicated notwithstanding her own belief that she had done no wrong and was innocent of the charge against her.

Petitioner contends that the evidence and proofs at the second hearing require a finding that she did not competently, intelligently, and with full understanding of the implications, waive her constitutional right to counsel, and that an order should be entered directing that she be released from further custody under the judgment based on her plea.

1. Petitioner Did Not Competently, Intelligently, and With Full Understanding of the Implications, Including the Possible Imposition of the Death Sentence, Waive Her Constitutional Right to Counsel and Plead Guilty to a Capital Crime.

If the District Court's determination of this issue is not supported by substantial evidence, the judgment entered in that Court must be reversed. In that connection, it is important to note that the District Judge did not confine decision to the "narrow scope" formulated by the separate opinion, but considered other contentions of petitioner in determining whether petitioner competently, intelligently, and with full understanding of the implications, waived her constitutional right to counsel (Tr. 710, 711, 715). As the District Judge did not indicate in his opinion what or how much weight he attached to the included contentions, it is not possible to determine which, if any,

of these additional issues were deemed controlling, or to assess to what extent they affected his determination of the remanded issue. It would perhaps be fair to assume that the conclusion reached reflects the impact of all the issues considered by the District Judge and that no means of appraising their separate contribution to the final result are presently available.

The District Court's Finding That Petitioner Was Aware of the Death Penalty Is Not Supported by Substantial Evidence.

In determining whether petitioner waived her constitutional right to counsel "with full understanding of the implications" (332 U.S. 325), an important consideration is whether she was aware of the fact that she faced a possible sentence of death.[15] The record clearly shows that no one ever advised petitioner of the death penalty (Collard: Tr. 122; petitioner: Tr. 261, 262; Heinrich von Moltke: Tr. 488, 489; Okrent: Tr. 582; Lehr (gave petitioner no advice): Tr. 665). The District Court found that Judge Lederle (before whom petitioner pleaded guilty) "apparently failed to specifically state the possible penalty" (Tr. 719), and was unable to find any evidence in the record that petitioner had been officially advised of the death penalty but rejected petitioner's contention in this respect as "an after-thought stimulated by observance in the Supreme Court's opinion that it didn't appear that she was directly informed concerning the penalty and second, that this back-watering was self-serving to offset

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[15] That the imposition of such a sentence was not a remote possibility is illustrated by the fact that Max Stephan was sentenced to death in 1942 in the United States District Court in Detroit for aiding and abetting an escaped German war prisoner (18 U.S.C. 1, 2). The sentence was affirmed on appeal (133 F. 2d 87) and certiorari denied by this Court (319 U.S. 423).

the turn the testimony had taken," and noted that in any event petitioner did not receive the dealth penalty (Tr. 720). The District Court specifically found that petitioner "was well aware of the possible deat penalty" on the ground that she had "free access" to all the newspapers and therefore must have seen newspapers published on September 17 and 18, 1943 containing articles in which the death penalty was mentioned (Tr. 719, 720). Petitioner testified that she could not have seen the articles referred to as she was held in close confinement at the immigration detention home from the time of her arrest on August 24, 1943 until she was arraigned on September 21, 1943, during which period she was not permitted to read newspapers (Tr. 459, 460). The District Court rejected this testimony on the ground that it was self-serving and designed to meet the introduction in evidence of the newspaper accounts referred to. The record does not appear to support the finding that petitioner testified she had "free access to all newspapers." Her complaint about publicity was made while she was confined at the county jail (Tr. 426) which was after the articles in question were published, and the record shows that she was principally concerned over the effect of the publicity on her family (R. 101). At the time the newspapers were marked as exhibits, the following occurred (Tr. 430):

> Mr. Field: There is no testimony that she was informed either by Judge Lederle or Judge Moinet that she might be subject to the death penalty.
>
> The Court: Well, I suppose the Judge thought she had been over there so much with the other members, that she knew the consequences of her act.
>
> Mr. Field: It might be a fatal error if that supposition is true.

* * * * * * *

The Court: If she didn't know about the death penalty?

Mr. Field: Yes, your Honor.

The Court: It might be, but I don't see how it is possible anybody charged with this kind of a crime, with all the publicity there was, and her husband out of jail and reading, how it would be possible for her not to know that the death penalty might be the result.

Mr. Field: On the other hand, your Honor, it isn't expected the defendant will learn the nature of the penalty from the newspapers.

The Court: Don't forget this, the burden of proof is on her here now.

The Court: *I don't care where she gets the information, if she gets it.*

Mr. Field: I think due process of law, your Honor, would require that the defendant be advised of the penalty.

It is submitted that petitioner sustained the burden of proof on this issue and that the failure of the District Court to advise her of the possible consequence of her plea at the time she pleaded guilty deprived her of her constitutional right to due process. *Kercheval* v. *United States,* 274 U.S. 220, 223; *De Meerleer* v. *Michigan,* 329 Mich. 663, 664; *Foster* v. *Illinois,* 332 U.S. 134, 137, 138; *Uveges* v. *Pennsylvania,* 335 U.S. 437, 442.

Implicit in the opinion and observations of the District Judge on this issue is the suggestion that the requirements of due process are satisfied if an accused learns, or is in position to learn, of the consequences of a plea of guilty through any source. It is submitted, however, that more is involved here than a mere matter of form; a procedure which imposes upon judicial officers a mandate that an accused be formally apprized of the consequences of a plea of guilty embodies an essential element of due process

and is grounded on reason, justice and fair play.[16] Mr. Justice Frankfurter's observation in *Adams* v. *United States*, 317 U. S. 269, 276, is deemed appropriate here:

> "But procedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of 'life, liberty, or property.'"

Petitioner Was Confused and Insufficiently Advised as to Her Right to Counsel

The perfunctory "assistance" of counsel furnished petitioner and her co-defendant Emma Leonhardt at their arraignment did not provide her with the type of protection intended by the Sixth Amendment.[17] Equally effective service could have been given petitioner by handing her a slip of paper bearing the following legend: "Defendants unfamiliar with court procedure are advised to stand mute when arraigned. By so doing the court will enter a plea of not guilty."

The admitted failure of the arraigning judge to appoint counsel for petitioner following her arraignment compounded the mischief and justified petitioner's erroneous conclusion that the reason counsel had not been appointed was because Judge Moinet had discovered she was an enemy

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[16] For an illuminating example of the effect of the decisions of this Court in *De Meerleer, Foster* and *Uveges* upon Michigan practice in connection with arraignments and pleas of guilty, see Michigan Court Rule 35A (318 Mich. xxxix; adopted June 4, 1947), which specifically requires as one of the prerequisites to a plea of guilty that the court inform the accused of the consequences of his plea. (For text of court rule see dissenting opinion of Circuit Judge McAllister, Tr. 796, 797.)

[17] "Furthermore, precedent and history aside, modern commentators regard assistance of counsel *prior to arraignment* as a prerequisite of due process." (Italics supplied.) National Commission on Law Observance and Enforcement (The Wickersham Commission), Report on Lawlessness in Law Enforcement, Vol. IV, pp. 5, 7, 281.

alien and therefore, as she had been advised, not entitled to have counsel (Tr. 131, 132). No one had advised her that after being indicted she was entitled to counsel (Tr. 106-110, 132) and it is undisputed that prior to indictment and while being held under presidential warrant as an enemy alien she was advised by an agent of the F.B.I. and an official at the immigration detention home that she had no right to counsel (Tr. 132).

The record shows that during the most critical period of the proceedings against petitioner, she was without counsel. In *Powell* v. *Alabama*, 287 U.S. 45, 57, it was stated:

> "• • • during the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."

The only consultation petitioner had was with Collard whose advice convinced her that under American law one can become guilty of conspiracy by simply associating with people who later turned out to be criminals or by overhearing plots subsequently carried out. Admittedly Collard made no investigation for petitioner, thorough-going or otherwise, nor did he do any research or aid petitioner in preparing for trial. To characterize the type of assistance of counsel given petitioner by Collard as compliance with the requirement of the Sixth Amendment would be to destroy the very protection the amendment was designed to throw about indigent and hard pressed defendants. It is submitted that under the circumstances shown by this record, petitioner was incapable of making an intelligent and competent waiver of counsel on the basis

of an "informed, self-determined choice" (332 U. S. 729). This Court has pointed out that courts indulge every reasonable presumption against waiver of fundamental constitutional rights. *Johnson* v. *Zerbst*, 304 U.S. 458, 464; *Glasser* v. *United States*, 315 U.S. 60, 70. In the latter case, this Court said (76):

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

Petitioner Was Advised by an Agent of the F.B.I. That Her Right to a Trial in the Event All Other Defendants Pleaded Guilty Rested With the District Attorney.

At the first hearing F.B.I. Agent Kirby testified as follows (R. 134):

> Q. And did she (petitioner) ask you if all the other defendants pleaded guilty whether she would have the right to a trial?
>
> A. I believe she did ask me that question on one occasion.
>
> Q. And did you answer that question?
>
> A. To the best of my recollection, my answer was that the question of the trial would be up to the United States Attorney's office.

If petitioner believed, as she had a right to believe from Kirby's statement, that her right to a trial rested with the District Attorney and did not know that her right to a trial was absolute and guaranteed to her by the Constitution (the Sixth Amendment) she was obviously not able to evaluate the significance of the waiver she signed and could not be expected to comprehend, let alone reconcile, conflicting statements as to her right to counsel and to trial from different official sources. It follows that under the circumstances petitioner could not have understood the full im-

plications of her act in waiving her right to counsel and to trial, and that therefore the presumption against waiver of fundamental rights should be applied.

Petitioner Did Not Know of the Presumption of Innocence Until After She Had Waived Counsel and Trial

No one told petitioner that she was presumed to be innocent of the crime with which she was charged or that if she were tried the burden would be upon the Government to establish her guilt beyond a reasonable doubt (Tr. 93, 154, 155). Petitioner finally learned about these matters (after she had pleaded guilty) through Okrent (Tr. 587). The District Court concluded that petitioner's knowledge or ignorance of the presumption of innocence played no part in inducing her plea and stated "we cannot forbear from adding that while many Americans may not know that an accused person is 'presumed to be innocent' we are skeptical that one so obviously intelligent as petitioner, in the dilemma she found herself in, under all the surrounding circumstances, could be unaware of as basic a part of our democratic system as that presumption" (Tr. 722). The difficulty with the Court's conclusion and statement is that the credible and undisputed evidence is directly to the contrary. Furthermore, the Court imputes to petitioner, an enemy alien, knowledge of a basic rule of evidence which the Court concedes may not be known by many Americans. It is submitted, therefore that the District Court's finding on this issue is unsupported by any evidence and cannot be sustained.

Petitioner Did Not Understand the Nature of the Crime With Which She Was Charged

Even conceding that petitioner was possessed of intellectual acuity of the highest order, it does not follow that she

comprehended the nature of a conspiracy. The District Court, however, decided that she did stating (Tr. 728): "This Court is convinced that Mrs. von Moltke knew more about conspiracy, the essentials thereof and the possible penalty in her case, than many a lawyer." It is respectfully submitted, however, that the Court's statement is not supported by the record. A reading of petitioner's testimony as to her understanding of the charge, is strongly persuasive that she was greatly confused concerning the charge of conspiracy and the overt acts. She had explained the circumstances underlying the five overt acts in which she was named to District Attorney Lehr at the enemy alien hearing and to Collard and Hanaway during the four days interrogation and she told Collard she could not understand why the overt acts were in the indictment when she had already explained them to their apparent satisfaction (Tr. 139-142). It is very obvious from the record that she did not understand the nature of the overt acts, and she understood from Collard, that they were not the important part of the indictment; that the important part was the conspiracy (Tr. 150-152). It was because she could not understand, that she appealed to all F. B. I. agents who came to the jail to advise her (Tr. 64) and it was because she needed advice and counsel that the conference with Collard was arranged at which he undertook to advise petitioner concerning the indictment and the charges (Tr. 75), including the five overt acts (Tr. 78).[18]

As pointed out in former opinion of this Court in this case, the crime of conspiracy is difficult of comprehension even for an intelligent layman. A moment's reflection will serve to demonstrate the truth of the statement that there is a qualitative difference between a charge involving a spe-

[18] Collard admitted that he did not try to discuss any "legal implications" with petitioner (Tr. 78).

cific crime (e. g. bank robbery) and a charge of conspiracy to commit such a crime. In the first instance there can be little question as to what one is charged with: robbing a bank involves well known criminal acts the nature of which are not easily misapprehended. One charged with conspiracy to rob a bank, however, is confronted by an entirely different situation involving numerous acts related to a central illegal enterprise ranging from active participation in the main objective to fringe participation which becomes criminal only under circumstances indicating guilty knowledge and intent to further the purpose of the illegal venture.

In the *Falcone* case referred to in the separate opinion of Mr. Justice Frankfurter (*United States* v. *Falcone*, 109 F. 2d 579) the question was whether the sellers of yeast and sugar to operators of illicit stills with knowledge that the materials were to be used in the manufacture of alcohol were guilty of conspiracy. In holding that they were not, Circuit Judge Learned Hand said:

> "There are indeed instances of criminal liability . . . where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow, but in prosecutions for conspiracy . . . his attitude towards forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided."

It is clear that mere cognizance or passive acquiescence is not sufficient to make one a party to a conspiracy (*United States* v. *Lancaster*, 44 F. 896; *White* v. *People*, 139 Ill. 143; *Jacobs* v. *Danciger*, 328 Mo. 458, 77 A. L. R. 1237, cert. den. 284 U. S. 675) and that failure of a person to prevent the carrying out of a conspiracy, even if he has the power to do so, will not make him guilty of conspiracy (*Marino* v. *United States*, 91 F. 2d 691, 113 A. L. R. 975, cert. den. 302 U. S. 764).

The difficulty of a layman evaluating a charge of conspiracy is further illustrated by the fact that decision on such a charge sometimes turns on the construction of a single word or sentence (*Keegan* v. *United States*, 325 U. S. 478) or even on a comma (*Singer* v. *United States*, 323 U. S. 338).

An example of the difficulty of the problem of defining conspiracy and differentiating it from the substantive crime involved is to be found in connection with the very indictment in which petitioner was named as defendant. The conviction of Dr. Thomas, a co-defendant, was reversed on appeal because Judge Moinet who presided at the trial failed to clarify to the jury the distinction between conspiracy to violate the Espionage Act of 1917 and the substantive crime of violating said Act. *Thomas* v. *United States* 151 F. 2d 183.

* * * * * * *

It is therefore respectfully submitted that petitioner did not competently, intelligently, and with full understanding of the implications, waive her constitutional right to counsel and plead guilty to a capital crime.

2. Petitioner Was Given Misleading and Erroneous Legal Advice by F.B.I. Agent Collard, Whereby She Was Induced to Plead Guilty Believing That a Defense to the Charge Was Useless and Her Only Hope the Mercy of the Court.

There is no doubt that Collard gave petitioner advice and on the basis of the evidence on the original hearing that the advice if given was misleading and erroneous (R. 55, 142, 143). The crucial issue at the second hearing was one of fact to be determined from "as close a recreation" of the conversation between petitioner and Collard as possible.

The District Court determined this issue against petitioner on the basis of credibility (Tr. 715) finding that the agent was a scrupulous witness, whereas petitioner was "artful and resourceful" (Tr. 716). The District Court also indicated that petitioner had decided to plead guilty before she received the alleged advice (Tr. 715), but apparently did not base decision on that ground. Petitioner expressly denied that she had decided to plead guilty before her conference with Collard (Tr. 365) and it is undisputed that petitioner did not plead guilty until October 7, 1943 which was five days after the conference took place according to Collard's testimony (Tr. 43).

At the first hearing Collard volunteered the statement that it was quite possible that petitioner's memory of the rum runner illustration was better than his (R. 143). On the second hearing Collard was specifically interrogated on this point and admitted that her memory was "every bit as good now as it was before" (Tr. 111). Questioned with respect to his testimony at the first hearing that it was quite possible petitioner asked him whether conferring with people who later turned out to be guilty of criminal acts would make her a criminal and guilty of criminal acts (R. 144) Collard admitted it was true, and that he did not dis-

pute anything in the record, but that he had no independent recollection of the incident (Tr. 88). He then testified as follows (Tr. 88):

> Q. Is your recollection on that point any better now than it was then?
> A. I hardly think so.
> Q. But is better now than it was then with respect to the illustration that you used, is that right?
> A. *Yes, sir, because I was never asked a question before on the illustration.*

Collard was mistaken. On the original hearing he was specifically interrogated about the rum runners example (R. 142) and the volunteered statement conceding that petitioner's memory of the incident was better than his followed (R. 143).

Although Collard testified at the second hearing that he had read the record of the original hearing to refresh his memory (Tr. 35), in response to questions concerning what advice he gave petitioner at the conference under consideration, he continually stated that he could not remember and that he could not answer (see for examples Tr. 51, 56, 57, 58, 61, 64, 66, 76, 77, 83, 97, 93) and at one point he testified as follows (Tr. 55, 56):

> Mr. Field: I am talking about whether the overt acts he discussed at the jail with Mrs. von Moltke had also been discussed by him in the original examination and had been a part of Mrs. von Moltke's statement?
> The Court: If you can answer that, you may.
>
> A. I am afraid I can't.
>
> By Mr. Field:
>
> Q. Is it because you have forgotten, Mr. Collard?
> A. Yes, I have forgotten, *and I am a little confused myself.*

At another point in his cross-examination Collard failed to recognize as his own testimony he had given at the original hearing stating "That isn't my testimony. That is another agent's testimony" (Tr. 94). Throughout his testimony at the second hearing Collard leaned heavily on the record at the original hearing. Examples follow:

(Tr. 50)

Q. You did tell Mrs. von Moltke that the F.B.I. was an investigating agency and not a prosecuting agency, did you not?

A. Are you reading from the record?

Q. I have taken this from the record, yes.

A. Yes, if the record so states.

(Tr. 54)

By Mr. Field:

Q. When you arrived at the jail, did Mrs. von Moltke ask you this question, whether you believed that she had told the truth when she had been examined by you and Mr. Hanaway?

A. Is that part of the record too? I can't remember those things now. If they are part of the record——

Q. Well, apart from the record, Mr. Collard?

A. Today I can't remember her saying that in 1943.

The most revealing example of Collard's propensity to tailor his testimony to that given on the original hearing is the following (Tr. 122):

Q. You know, don't you, Mr. Collard, that shortly after Mrs. von Moltke pleaded guilty she endeavored to withdraw that plea and substitute a plea of not guilty?

Mr. Fordell: That is a matter of record.

Mr. Field: I am asking him.

A. I don't know that.

By Mr. Field:

Q. You don't know that?
A. Not unless it is something in these records.
Q. If it is in the record you know it, and if it isn't in the record you don't know it, is that right?
A. Yes.

The hypothesis that Collard was a scrupulous witness, gathered from his testimony at the first hearing, needs considerable revision in the face of the foregoing examples. They demonstrate that he was a cagey and evasive witness whose memory was more sensitively turned to possibilities of justifying his conduct and actions toward petitioner than it was to as fair and objective a re-creation of the crucial conference between him and petitioner as was possible.

The New Evidence of the Rum Runners Illustration

At the second hearing Collard testified on direct examination concerning the rum runners illustration (Tr. 38-41):

Q. Did you give her that advice?
A. *As a lawyer,* I couldn't have given her that illustration of a rum runner.[19]

Recognizing that Collard's testimony was not a denial of petitioner's testimony, the District Judge and the Assistant U. S. Attorney, interposed, and the following ensued:

The Court: Did you or didn't you?

By Mr. Fordell:

Q. Did you give her an illustration?

The Court: First begin with the illustration. Did you give her the illustration in the manner she has out-

[19] It is a reasonable inference that Collard got his clue for this statement from the following language in the separate opinion (332 U.S. 730): "He (Collard) did not even suggest that even though he did not remember, he was confident that he could not have given her the kind of misleading legal advice she attributed to him."

lined you gave it to her, *and if you did not, could she have arrived at that conclusion from anything you said?*

A. No, sir.

By Mr. Fordell:

Q. You do recall giving her an illustration, is that it?

A. I said at the other hearing that it is quite possible I gave her an illustration concerning a rum runner's case, yes, sir, but not the illustration as she said in her testimony, no, sir.

* * * * * * *

The Court: The Court would be interested, Mr. Fordell, in knowing what the illustration was he gave her, *if he did give her one.*

By Mr. Fordell:

Q. Do you recall the illustration that you gave her?

A. To the best of my ability now, to remember, it is quite possible while talking to Mrs. von Moltke that I used an illustration of a rum runner's case to attempt to show the general law of conspiracy. And to the best of memory now, *if I did use such a case,* I *probably* told her that where several people get together and decide among themselves to run rum across the Detroit River, and should subsequently one of those persons proceed to run some rum across the Detroit River, those persons who would be together originally agreeing to so run the rum would be guilty of a conspiracy.

The Court: That wouldn't be exactly true either, would it, Mr. Fordell?

Mr. Fordell: It is the general law that if two people agree to violate a law and one commits an overt act to carry out that agreement, both of them are guilty.

The Court: Yes, if one of them does anything to carry it out.

Mr. Fordell: That is right.

A. (Mr. Collard): *That is what I meant to say.*

Mr. Fordell: That is, I believe, what the witness stated.

The Court: That is, it is possible for one to withdraw from a conspiracy—I will have to read that. In other words, according to her statement she had the idea if she happened to be in the room where some people conspired, and two years afterwards if they did something, the fact that she was in the room would be sufficient to convict her. *Did you ever give her such information?*

A. No, sir. That I definitely did not give her, no, sir.

The Court: That wouldn't be anything near the law, would it?

A. No, sir, it would not be.

The Court: *And there has to be an agreement in a conspiracy, and one person must do an overt act?*

A. That is right.

The Court: And if *one person* does an overt act then those who have agreed to the conspiracy, are all liable?

A. Yes, sir.

The Court: *That is what you think* you told her?

A. Yes, sir.

The Court: Would it have been possible for her, do you think, under the circumstances, being in jail, and apparently friendless, the nation she had come from at war with the United States * * * Might it have been possible for her to have been in such a state of mind as to not have understood the example, that you gave?

A. I do not think so, your Honor, no, sir.

The Court: She was not flustered or excited?

A. No, sir.[20]

* * * * * * *

The Court: Of course, in giving any kind of illustration you didn't go into all the details and possibilities?

A. No.

---

[20] On cross-examination Collard testified that he could not remember whether petitioner was tense and excited on the date in question (Tr. 66).

The Court: *Are you sure that you made clear to her that she must have participated in the agreement?*

A. Yes, sir.[21]

The Court: Or understanding?

A. Yes, sir.

The Court: It didn't have to be in writing?

A. That is right, it doesn't have to be in writing.

The Court: *There is no question in your own mind but what she understood what you were saying?*

A. That is right, yes, sir.

From the foregoing it is clear as was pointed out in Circuit Judge McAllister's dissenting opinion (Tr. 778-780) that Collard was "guided by suggestive and leading questions in his testimony on the crucial point" and that "his answers were elicited only by a series of leading and suggestive questions." It should be added, furthermore, that the testimony as given is far removed from the factual recreation of the incident under consideration sought by this Court and that in many instances the District Judge was in effect testifying for the witness. Circuit Judge McAllister evaluated Collard's testimony on the crucial issue as follows (Tr. 781, 782):

> Taking the foregoing testimony of Collard as a whole, together with his prior admissions that he remembered nothing of using any illustration of a rum runner, and his concessions that Mrs. von Moltke's memory was better than his own, it is impossible to conclude that such testimony constitutes substantial evidence to sustain findings based upon it * * * Moreover, a fair reading of Collard's testimony, with its uncertainties, contradictions, and vagueness in relation to facts as testified to by Mrs. von Moltke, and in many cases, his total failure to remember many of the most crucial events in which he was one of the chief participants, does not really present an issue of credibility as between these two witnesses.

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[21] This element was not included in the example as given (Tr. 39).

On cross-examination, Collard was asked to repeat the illustration used and the following occurred (Tr. 119, 120):

> A. As best I remember it, I told Mrs. von Moltke that if several persons discussed and agreed to run rum across the Detroit River, and subsequently one of those parties to the original agreement did so run rum across the Detroit River, then the persons, *other than himself,* in the original agreement would be guilty of a conspiracy. * * *

The italicised phrase was absent from the version Collard gave in direct examination (Tr. 39). It is obvious that the added phrase effects a radical change in meaning. In the examples first given, if one of the parties to the illegal agreement subsequently ran rum across the Detroit River, all parties would be guilty of conspiracy. In the second version, all parties to the agreement "other than himself" would be guilty of conspiracy. In other words, under the first example all are guilty, under the second all *but one* would be guilty. It is submitted that this constitutes clear proof that Collard's memory was faulty on the most crucial issue in the case and strong confirmation of his own concession that even on the second hearing Mrs. von Moltke's memory of the illustration used was better than his (Tr. 111).

Collard was cross examined as to the difference between the two illustrations with the following significant results (Tr. 120):

> By Mr. Field:
>
> Q. In other words, the difference between the illustration that Mrs. von Moltke testified to and the one that you just gave the court, is that there must be active participation *by all parties to the conspiracy?*
>
> A. No, sir, that isn't the difference.
>
> Q. What is the difference?

A. I believe Mrs. vonMoltke's testimony, according *to the record*, says that just someone seen in a room *hearing such a discussion going on*,[22] would be guilty.

Q. And you didn't use that?

A. I very definitely don't think I used any such illustration as that, no, sir.

Q. I see. However, you do admit it is difficult for you to recall at this time all the facts that transpired over five years ago, is that correct?

A. Yes, it is.

Although a detailed "log" was kept of the four day examination of petitioner by Collard and Hanaway (Tr. 183), Collard admitted that he made no notes and kept no record of this conference with petitioner at the jail at which he advised her of the indictment and the charges (Tr. 120) though he knew in advance what the conference was to be about (Tr. 34).

* * * * * * *

On this issue, therefore, it is submitted that petitioner was given misleading and erroneous legal advice by Collard, acting as a member of the prosecution, whereby she was induced to plead guilty believing that a defense to the charge against her was useless and that her only hope was the mercy of the court.

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[22] The District Court's opinion states (Tr. 712):

"Of course we recognize that over-hearing others planning against the government would not have been sufficient to convict petitioner of conspiracy" but found that petitioner added the element of "over-hearing" to the illustration at the second hearing in an attempt to strengthen her claim. The above quoted testimony of Collard, however, was given at the second hearing *before* petitioner testified and clearly shows that he understood that the illustration as originally given by her included the element of over-hearing others plotting.

3. The District Court's Findings That Petitioner Was Not Misled by Erroneous Advice Given Her by Collard and That She Pleaded Guilty to a Capital Crime With Full Knowledge of Her Constitutional Rights to the Assistance of Counsel and Trial Are Not Supported by Substantial Evidence.

Much that has been said in the preceding sections of this brief could be repeated here. Careful analysis of the District Court's opinion discloses that the crucial issue in the case was misconceived as one of credibility between the testimony of Collard and petitioner rather than the factual problem of whether or not Collard's testimony, carefully evaluated, constituted substantial proof that petitioner's version of the incident was untrue or whether, as Collard himself admitted, petitioner's memory was not the more reliable. The District Judge noted Collard's admission on the first hearing that petitioner's memory was possibly better than his, but sought to excuse Collard's failure to contradict petitioner's testimony of the rum runners illustration on the ground that he was "suddenly confronted" with the testimony at the first hearing and "As a gentleman, he was unwilling to contradict Mrs. von Moltke because before Judge O'Brien he seemingly didn't have a great deal of time to consider it *and its importance might not have been apparent to him*" (Tr. 714).

This, however, does not explain Collard's second admission that petitioner's memory was better than his, nor the fact that Collard's memory at the second hearing was no better than it was at the first, according to his own admission (Tr. 88 and see Tr. 56). Moreover, at the second hearing, Collard repeatedly referred to and relied upon his testimony at the first hearing as evidence of the truth of his statements (e. g. Tr. 47, 50, 54, 76, 88, 94).

As pointed out in a preceding section of this brief, the District Court did not confine decision to what was termed the "narrow scope" of inquiry suggested by the separate opinion but considered the other issues hereinbefore discussed (Tr. 710). What weight was given these additional issues and their bearing, if any, upon what was referred to in the separate opinion as the "crucial issue" is impossible to determine. It is quite apparent from the opinion, however, that the added issues were not entirely without weight in the District Court's consideration of the case, particularly with respect to petitioner's credibility (Tr. 716, 718, 719, 722, 726, 727).

For the reasons presented herein and those given in the disssenting opinion of Circuit Judge McAllister (189 F. 2d 56, 61) it is respectfully contended that the findings of the District Court on this question are not sustained by substantial evidence and that the judgment based thereon should be reversed. *National Labor Relations Board* v. *Abell Co.*, C. A. 4, 97 F. 2d 951; *Labor Board* v. *Columbia Co.*, 306 U. S. 271; *Burgess* v. *Gilchrist*, 123 W. Va. 727, 17 S. E. 2d 804, 138 A. L. R. 676, 684; *United States* v. *McAlister*, C. A. 9, 88 F. 2d 379.

Conclusion

In consideration of the premises, petitioner submits that the judgment entered herein dismissing her petition for writ of habeas corpus and discharging the writ is in error and prays that the same be reversed and petitioner released from further imprisonment under said judgment.

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January, 1952.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 78

MARIANNA VON MOLTKE, PETITIONER

v.

A. BLAKE GILLIES, SUPERINTENDENT OF THE DETROIT HOUSE OF CORRECTION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court on the first hearing (R. 170-174)[1] is reported at 72 F. Supp. 994. The majority and dissenting opinions in

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[1] The symbol "R" refers to the printed record of the proceedings on the first hearing, and "Tr." to the supplemental transcript on the second hearing, which is not printed. On the second hearing, by agreement of counsel, it was ordered that all records, proceedings and evidence in the original hearing before District Judge O'Brien be admitted into and considered as part of the proceeding in the rehearing of the matter before district Judge Picard.

the Circuit Court of Appeals on the first appeal (R. 182-198) are reported at 161 F. 2d 113. The opinion of this Court remanding the cause for further testimony is reported at 332 U.S. 708. The second opinion of the District Court (Tr. 709-729) is not reported. The second majority and dissenting opinions in the Court of Appeals (attached as an appendix to the supplemental trial transcript) are reported at 189 F. 2d 56.

JURISDICTION

The judgment of the Court of Appeals was entered April 6, 1951 (Tr. 752). The petition for a writ of certiorari was filed May 28, 1951, and granted October 8, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court was warranted in finding that petitioner failed to prove that she pleaded guilty in reliance on erroneous advice of an F.B.I. agent.

2. Whether the District Court was warranted in finding that petitioner failed to prove that she did not freely, intelligently, and knowingly waive her right to the assistance of counsel.

STATEMENT

I

Introduction

This is a sequel to proceedings previously considered by this Court in *von Moltke* v. *Gillies*, 332

U.S. 708, in which this Court remanded the cause for further testimony.

The proceedings were instituted on February 7, 1946, when petitioner, who had been sentenced to four years' imprisonment for violation of the Espionage Act of June 15, 1917 [2] (R. 8-9), brought a habeas corpus proceeding in the District Court for the Eastern District of Michigan (R. 1-8) collaterally attacking the judgment on the ground that her plea of guilty and her waiver of right to counsel were not competently and intelligently made. On April 26, 1946, after a trial of the issues, the writ was dismissed (R. 175; 72 F. Supp. 994). On Appeal to the Court of Appeals for the Sixth Circuit, the judgment was affirmed (R. 181), one judge dissenting (R. 189-198; 161 F. 2d 113).

This Court granted petitioner's first petition for certiorari, and after review, rendered three opinions without majority. Four justices were of the opinion that, on the undisputed facts, petitioner's conviction should have been set aside.[3] Three justices were of the opinion that petitioner had failed to establish her claim.[4] Two justices [5] thought that there was insufficient evidence on what was to them the critical issue, "the truth of petitioner's allega-

[2] Title I, c. 30, 40 Stat. 217 (50 U.S.C. 32, 34).

[3] Opinion of Justice Black, 332 U.S. 708-727, concurred in by Justices Douglas, Murphy and Rutledge.

[4] Opinion of Justice Burton, 332 U.S. at pp. 731-741, concurred in by the Chief Justice and Justice Reed.

[5] Opinion of Justice Frankfurter, 332 U.S. 727-731, concurred in by Justice Jackson.

tion that she was advised by an F.B.I. agent, active in the case, that one who merely associated, however innocently, with persons who were parties to a criminal conspiracy was equally guilty." Accordingly the cause was remanded to the District Court for further hearing.

On the rehearing, by agreement of counsel, the record of the original hearing was deemed part of the new proceeding. The new testimony related to many of the facts developed at the original hearing, in addition to the specific question referred to in Mr. Justice Frankfurter's opinion. We therefore summarize the general background brought out at the combined hearings with particular emphasis on the new evidence adduced at the second hearing, and then discuss the new evidence on the specific question for which the cause was remanded.[5a]

II

The Factual Background

Petitioner, a German countess, was married to a senior instructor of German literature at Wayne University with whom she had come to the United States in 1926 (R. 2, 48, 70; see also Tr. 155, 160, 475-476). She herself had completed the equivalent of two years college study at Wayne University. (Tr. 148-149.) In addition to her household duties, she was an active member of the German

[5a] Because the evidence taken at the second hearing was not printed we shall, for the convenience of the Court, quote fairly extensively herein from relevant portions of that evidence.

chapter of the Red Cross and the local parent-teachers association, and a social worker at the Y.W.C.A. International Center (R. 89-90; see also Tr. 210). She speaks fluent English (Tr. 152). Several witnesses testified that she is very intelligent (Tr. 66, 651, 657). Her husband, a German count, had been in the German army in World War I (Tr. 524-525). He had studied law, including criminal law, before he came to the United States in 1926 with his wife (Tr. 489-493). The couple have four children. In June 1939, after the German conquest of Czechoslovakia, petitioner sent two of her sons, age 8 and 19, to Europe. The oldest one joined the German army and the Hitler Youth movement (Tr. 236-241, 339, 567-568, 690, 692).

During the war petitioner was registered as an alien enemy. She applied for American citizenship immediately after the war began and her naturalization was pending at the time of trial (Tr. 344-345).

On August 24, 1943 she was arrested on a Presidential warrant as a dangerous enemy alien, and was detained at an Immigration Detention Home (R. 48-50, 126-127). There she was questioned over a four-day period by F.B.I. agents who, she admits, were courteous and friendly (R. 49).

The F.B.I. detention log, which was admitted in evidence (Ex. 2; Tr. 183-184)[6] gives a de-

[6] Exhibit 2, although admitted in evidence, was not filed with the Clerk, but returned to respondent. We are accordingly lodging it with the Clerk of this Court. We have numbered the pages in pencil for the convenience of the Court.

tailed account of minute events during petitioner's questioning. Petitioner was brought to the federal building each day, about noon on the first day and about 10:30 or 11 a. m. on the three succeeding days (Ex. 2, pp. 17, 24, 32), and remained there until about 8:30 to 9:30 at night (Ex. 2, pp. 16, 23, 31, 39). The questioning was leisurely, with frequent interruptions for meals, and for general conversation (Ex. 2, pp. 9-10, 12-14, 19, 20-21, 25-26, 28, 29-30, 33, 34, 37). The agents frequently asked petitioner how she felt (Ex. 2, pp. 4-5, 7, 8, 9, 10, 11, 15, 18, 19, 24, 27, 29, 33, 35), bought cigarettes for her (Ex. 2, p. 5) and called her husband for her (Ex. 2, pp. 14, 22). When the questioning started petitioner was advised of her constitutional rights. She asked to see the warrant and then read it (Ex. 2, p. 8). She voluntarily gave a full statement of her associations with other persons subsequently named as co-defendants (R. 49, 55, 95, 121, 126-127, 143; see also Tr. 274-339, 529-537).[7] This statement was at the Court's insistence placed in evidence as Ex. 1 at the second hearing (Tr. 145). A stenographer was present and each day a summary of petitioner's statements was dictated. Although in narrative form, the statement contains many of petitioner's

[7] At the time of the arrest, Count von Moltke gave the F.B.I. agents permission to search his house (R. 48). A short-wave radio was found in the basement of the home. Previous to this petitioner had told Government officers that she was not in possession of a short-wave radio (Respondent's Ex. 3, pp. 111-113).

words (Tr. 531). In fact petitioner, in her testimony at the second hearing, stated that she had discussed the correct phraseology with the agents (Tr. 204; see also Ex. 2, p. 33). When the typed statement was prepared, petitioner read each page, made corrections, and initialed each page. Where she corrected the typed copies she initialed the changes (Tr. 274-277, 532. See Ex. 2, pp. 29, 30-31, 33, 34). Although she was told that she was not obliged to sign the statement (Tr. 533), she did so. She was told she could make any changes in it both before and after she signed it, or withdraw it altogether (Tr. 180-181). She admits she took no exception to the statement (Tr. 204). Petitioner also admitted to United States Attorney John C. Lehr in 1944 that this statement was substantially correct as given (Tr. 630).

In the statement, petitioner admitted various meetings with Theresa Behrens, Grace Buchanan-Dineen, Edward Arndt, and Emma Elsie Leonhardt, mentioned in overt acts XXIV, XXIX, XXX, XXXI, and XXXII of the indictment (R. 29-31), although she described them as social meetings. She admitted that Countess Grace Buchanan-Dineen, whom she had previously learned "was supposed to be an agent in this country in the interest of the Axis nations" recently arrived from Hungary, was brought to her home by Mrs. Behrens on December 20, 1941 (Cf. Overt Act XXIV; R. 29) and that on that occasion Mrs. Behrens told peti-

tioner that she (Mrs. Behrens) was keeping money for Countess Dineen and furnishing material for her espionage work. Petitioner further stated that on March 28, 1942, she again had Countess Dineen as a guest in her home and on that occasion introduced Edward Arndt to her (Cf. Overt Act XXIX; R. 30).

She also admitted in the statement that on March 29, 1942, she attended a gathering at the apartment of Countess Dineen at which Mrs. Behrens and others were present (Cf. Overt Act XXX, R. 30). After cocktails were served, petitioner stated to the group on that occasion:

> * * * Any person on duty or in service, and especially in Secret Service, is burdened with a dreadful responsibility and must be extremely careful about drinking to excess and also must avoid all emotional entanglements. * * *

Countess Dineen replied that she would never entangle herself, that "the Cause" and her work for the "Fatherland" made drinking necessary. Petitioner further stated that Countess Dineen "had started the evening with the toast 'Seig Heil' (sic) and several times during the evening had used words and phrases that I thought unwise for an Agent to use." Later, petitioner stated:

> Mrs. Behrens, to remove all doubt as to DINEEN'S identity, mission, and competence as an Agent, and to cut short the discussion

> which was becoming embarrassing to Miss DINEEN, stated, "I can assure you that GRACE is all right. She comes with the highest recommendations from GYULA and SARI, and that's enough for me; otherwise, do you think I would have taken our time to associate with her."[8]

Petitioner further admitted in the statement that, in the last week of January 1943, she gave Countess Dineen the address of a Count Lingen in Switzerland and wrote a note to him asking that he forward the enclosed letter to Gyula Rozinek (the Hungarian leader of the pro-German Party) (Cf. Overt Act XXXII; R. 31).[9] On the final page of the sixteen-page statement petitioner said:

> At this time I wish to state that at the time I met GRACE BUCHANAN-DINEEN in 1941 I was a German citizen, and I felt and still feel that until the time comes when I receive my naturalization papers, I am a German citizen and as long as I remain a German citizen my loyalty is due and owing to Germany. I felt that if I were told that Miss DINEEN was a spy or an agent as long as I was a guest in this country the only thing for me to do was to stay away from her and give her no help or support. I feel that being a German citizen I cannot look to the United States for protection

[8] Gyula and Sari are Gyula Rosinek, the Hungarian leader of the pro-German party, and his wife Sari (Tr. 189-190).

[9] This fact was conceded by petitioner at the second hearing (Tr. 335-339).

> of any rights I may have, but must look to Germany for that protection and for those rights.
>
> The day that I take the oath of allegiance to the United States, I shall then look to the United States Government for all privileges and rights due and owing to me at that time.
>
> I feel that I have tried to carry out my obligations as a guest in this country by protecting certain friends although I feel that I cannot be a woman without a country—half German, half American. I must be one or the other in the interests of all people concerned.

On September 1, 1943, petitioner testified before the Enemy Alien Board (R. 88).[10] While she did not retract the admissions in her statement, she did offer somewhat different explanations of various incidents, particularly the note to Count Lingen (Ex. 3, p. 101).[11] However, she admitted at the hearing that Mrs. Behrens conveyed the idea to her that Countess Dineen was doing espionage work for the Axis (Tr. 300-301).

On September 18, 1943, a copy of the indictment here involved was handed to her, and she read it (R. 50, 90-91; see also Tr. 127, 390). On September 21, she and a co-defendant, Mrs. Leonhardt, were brought before Judge Moinet for arraignment. The judge informed them that they were entitled

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[10] Enemy aliens were not represented by counsel before the Enemy Alien Board (R. 128; see also Tr. 106, 132).

[11] Much of the testimony before the Board is set out in Respondent's Exhibit 3.

to counsel, and when they said they had no money for counsel, he stated that he would appoint counsel for them (R. 51; see also Tr. 130, 637). The court appointed an attorney at that juncture for the purpose of arraignment only. After both women indicated to the attorney in a whispered conversation that they understood the indictment, and that they were not guilty, he advised them to stand mute, which they did, and a plea of not guilty was entered (R. 51-52, 110-112). Petitioner was then taken to the Wayne County jail with Mrs. Behrens and Mrs. Leonhardt with whom she shared the same cellblock (R. 53; see also Tr. 255).

The three women avidly read newspaper items relating to the case (R. 151-152). When agents of the F.B.I. came to interrogate Mrs. Behrens, petitioner would frequently engage in conversations with them (R. 53-54, 122, 134, 147). They refused to advise her and told her to consult an attorney (R. 121, 129, 147, 151-153). Hanaway did tell her "if she felt that she were innocent in her heart she should under no circumstances plead guilty" (R. 122).

On September 25, Okrent, an attorney who had been a pupil of petitioner's husband, and Okrent's partner, Berger, called on petitioner. They told her they had come at her husband's request and would let her husband know whether they would take the case (R. 56-57, 91-93, 114-118; see also Tr. 386-387). Their visit was "primarily to en-

able" Okrent to advise her husband "what steps to take" (R. 13). Evidence was adduced to show that these attorneys were with her from 2:51 p.m. to 5:45 p.m. (R. 92; see also Tr. 601-602 and Ex. 9). Although petitioner first testified that she did not ask the lawyers to advise her (R. 56) and that the discussions related to family affairs "entirely" (R. 93), Okrent testified on the second hearing that petitioner asked him to explain the indictment (Tr. 611-612). Berger testified that they read parts of the indictment to her (R. 119), while Okrent testified on the second hearing that the indictment was not read to her, and that Berger was incorrect in his testimony as to this (Tr. 596-597, 605-607). Okrent did, however, admit that they discussed the case (Tr. 599-600). Berger testified that "the question of pleading guilty came up" and Berger told her "if you are guilty, plead guilty; and if you are not, do not." (R. 120). Although Berger indicated a reluctance to take the case (R. 116; see also Tr. 134-135), Okrent testified that he had made no decision as to whether or not he would represent her on the trial before her subsequent change of plea (Tr. 577). Okrent testified that he went to see Mr. von Moltke after this interview some time between September 29 and October 2 (Tr. 612).

On September 28, petitioner, on her own initiative, indicated a desire to plead guilty. She and a co-defendant, Mrs. Leonhardt, were taken to the Marshal's office. She told Hanaway, one of the

F.B.I. agents, and Babcock, an Assistant United States Attorney, that she would plead guilty if she would receive assurances that there would be no more publicity, that she would not be sent far away from Detroit, and that she would not be deported (R. 58, 99-100, 122-123; see also Tr. 367-368, 418-419). She was informed by the agent and by Babcock that they were powerless to grant these conditions. Babcock said that he would recommend that she be imprisoned near home because of her family situation, but that such recommendation was not binding (R. 123-125). She was told that if she was innocent, she should not plead guilty (R. 122-125), and that she should decide for herself how to plead "on the basis of whether or not in her own conscience she had to say that she was guilty" (R. 158-159; see also R. 101). Agent Dunham went to her husband's place of business and notified him that his wife had indicated a desire to plead guilty. Her husband came and dissuaded her from this course (R. 125, 148-149; see also Tr. 252, 380-382). Mr. von Moltke testified that his wife told him on September 28 that she did not know of any way out other than to plead guilty (Tr. 483). He told her not to plead guilty; that he would try to send Mr. Okrent, the lawyer, and that she should talk with him first.[12] She

[12] After first denying that her husband had received any education in law, petitioner admitted that he had received "a certain amount of education in German law before the first World War" (R. 97). On the second hearing it was

agreed that she would wait for Mr. Okrent (Tr. 252, 380-382).[13] Mrs. Leonhardt said, "I am going to plead guilty anyway" (R. 148-149), and she changed her plea that day (Tr. 550).

On October 2,[14] petitioner sent for Collard, the F.B.I. agent who had previously taken her statement at the time of her hearing before the Enemy Alien Board (R. 55, 140; see also Tr. 34-36, 53). Collard and petitioner talked together in an office room of the jail. Agent Hanaway was also present. Collard testified that on her copy of the indictment, several of the overt acts pertaining to petitioner were encircled, and that she asked him to try to explain the indictment to her (R. 55). The nature of his explanation is the specific issue on which clarification was ordered. (See pp. 20-48, *infra*).

Petitioner again talked with her husband on October 6 (Tr. 258, 382). She testified as follows relative to this conversation (Tr. 382):

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brought out that he had studied law for three years, including criminal law, in Germany. He knew the American law that his wife was entitled to a trial and to counsel (Tr. 489-493).

[13] Mrs. Behrens changed her plea from not guilty to guilty on October 2, 1943. See *Behrens* v. *Hironimus*, 166 F. 2d 245, 246 (C.A. 4).

[14] Petitioner contended this incident occurred before October 2. At times she testified that this conversation took place on September 27 and at other times September 28 (R. 56; see also Tr. 138, 160, 367, 405), while Collard testified this conversation took place on October 2, substantiating this date with records, prepared in 1944, indicating his jail visits (R. 140; see also Tr. 35, 534-535, Respondent's Ex. 9). Both courts below found that the conversation occurred on October 2 (Tr. 715; 189 F. 2d at 60).

Q. Did you ask him why the lawyer didn't come?

A. My husband asked me, was the lawyer there, because he had contacted Mr. Okrent and Mr. Okrent said he was very busy but he would try to come up and see me.

The next day, October 7, petitioner decided to disregard her husband's advice and plead guilty (R. 63-65; see also Tr. 384-385). On the second hearing petitioner testified that she had been waiting for Okrent, the lawyer, to come see her before she pleaded guilty until on October 5 (Tr. 382) "the rumor came up with Mrs. Behrens that if I wouldn't fall in line that my husband would be arrested". According to her testimony, the fact that Collard, when queried thereon, could give her no answer, "finally caused [her] to plead guilty" (Tr. 254-258, 304, 356-357, 383).

Petitioner was brought before Judge Lederle (R. 65, 138-139), and while he at first demurred at accepting her plea because she was not represented by counsel who had appeared, he later accepted it, according to petitioner, when Assistant United States Attorney Babcock assured him that he could accept the plea (R. 66). Petitioner, after being informed of her constitutional right to counsel by Judge Lederle (R. 35), then signed a written waiver of counsel (R. 66-67), as follows (R. 36):

I, Marianna von Moltke, being the defendant in the above entitled cause, having been

> advised by the Court of my right to be represented by counsel, and having been asked by the Court whether I desire counsel to be assigned by the Court, do hereby, in open court, voluntarily waive and relinquish my right to be represented by counsel at the trial of this cause.

The change of plea signed by Judge Lederle (see R. 35) recites, *inter alia,* that petitioner was "fully informed of her constitutional rights to counsel". Judge Lederle asked her whether the indictment had been explained to her and she said "Yes" (R. 67-68, 107, 139). She was asked by the court whether she pleaded guilty because she felt guilty, and she answered in the affirmative (R. 68, 107-108, 133). She also told the court that the plea of guilty was not upon the suggestion of any government agent (R. 133). Babcock testified that "Judge Lederle was extremely careful and meticulous to make sure, as he always does, that she understood what she was doing" (R. 160, 166).

Collard testified that the judge "went to considerable pains to ask her the questions that he should have to guarantee the rights that she had, and to convince himself * * *" (R. 139). Although she contended later that she had made a statement to Babcock that she wanted to plead guilty although she was not guilty, this was denied by Babcock and Collard (R. 138, 159). Petitioner admitted that no one threatened her or made

promises to her to induce her plea of guilty (R. 99), and the agents testified that they made no threats or promises of any kind to induce her to plead guilty (R. 121, 131, 133, 136, 147).

Sometime prior to January 5, 1944, Mr. Walter Nelson, the lawyer for co-defendant Thomas, sent word to the jail that petitioner and co-defendant Leonhardt had a right to change their plea of guilty if they felt they had made a mistake. Petitioner testified that Collard verified this information on January 5 in a visit he made to the jail. (Tr. 265.)

Thereafter on January 18, or January 20, 1944 petitioner came to the office of United States Attorney John C. Lehr at her own request (Tr. 266, 625). "* * * the substance of her conversation at that time was that she was very much disturbed about the economical situation in which her husband had found himself by reason of her plea of guilty, and that she wanted to go into the matter of a possibility at some time of changing her plea." This was not a formal request and she was not definite in this desire. (Tr. 625-626.)

During the months of February and March 1944, petitioner was visited on five occasions by Okrent (Tr. 537), the lawyer who had visited her prior to her change of plea, and the same lawyer who subsequently represented her in her petition to change her plea.

United States Attorney Lehr again saw her on

March 17, 1944, at the conclusion of the case against Dr. Thomas, a co-conspirator. At that time she wanted to make certain changes in her statement given before the Alien Enemy Hearing Board. She went into a lengthy explanation of why she had given the so-called drop-letter address to Countess Dineen, stating that this was done to get into her good graces and enhance her husband's position with the superintendent of schools who was fond of Countess Dineen. (Tr. 626-627.)

On that occasion she did not change her statement, but on March 24, 1944, she spent three hours with United States Attorney Lehr who gave her a pad of paper and a pencil and told her "to take her time, and to go over the entire statement" and make notes which he would discuss with her later. She was given "a long time" without any interruptions. Her changes were "largely a matter of change in phraseology" and the final conclusion was that the statement was correct as originally given. (Tr. 629-630.) She made no denial of the fact that she knew Countess Dineen to be an Axis spy (Tr. 630-631). Her principal concern was for her family and the situation in which her husband found himself as a result of her involvement. In none of her conversations with United States Attorney Lehr did petitioner make any mention of erroneous legal advice given her prior to her change of plea. (Tr. 635-636.)[15]

[15] This March 24th conference was the day before Countess Dineen was to be brought in for sentencing (Tr. 638-639).

On June 30 in another conversation with Mr. Lehr, petitioner told him that the reason she pleaded guilty "was that she had been informed by Theresa Behrens, a co-defendant * * *, that if the defendant von Moltke failed to plead guilty, her husband might be implicated in the affair" (Tr. 650). Later that day she was taken before Judge Moinet, and Mr. Lehr advised the court that petitioner wanted to withdraw her guilty plea and enter a plea of not guilty. Judge Moinet allowed her to name an attorney, and at a subsequent time Mr. Lehr suggested the name of Okrent. (Tr. 645-646.) Petitioner testified that her husband went to Okrent and got him to agree to file a petition for leave to withdraw her plea (Tr. 270). On August 7, 1944, petitioner, through her counsel Mr. Okrent, filed a motion for leave to withdraw her plea of guilty, setting forth that at the time of her plea she was upset, that she was not represented by counsel, and that she was not guilty of the crime (R. 37). Her motion was supported by an affidavit which, though rather extensive, makes no mention of any erroneous legal advice given her by Collard (R. 38-45).

Following a hearing, the motion was on November 16, 1944,[16] denied by Judge Moinet, who found

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[16] This delay occurred because of the difficulty the government counsel had in getting affidavits from various former F.B.I. agents who had left the service and who were in scattered parts of the country, because of an adjournment at petitioner's request, and because of the intervention of the summer recess (Tr. 646-648).

that petitioner was properly advised of her constitutional rights by the court both prior to and at the time she entered her plea of guilty, that her plea was submitted after due and careful deliberation, that petitioner was advised of and thoroughly understood the nature of the charge contained in the indictment, that the plea was not induced by any promises or misrepresentations, and that the motion for leave to withdraw the plea was not filed within the ten-day period prescribed by Rule 2(4) of the Criminal Appeals Rules then in effect (R. 46-47).

On November 15, 1944, petitioner was sentenced to imprisonment for four years (R. 8-9). The petition for a writ of habeas corpus was filed on February 7, 1946 (R. 1-16).

III

Collard's Advice and Petitioner's Reliance Thereon

The mandate of this Court (Tr. 11) required that further hearings be held on the issues of fact discussed in the separate opinion of Mr. Justice Frankfurter in which Mr. Justice Jackson joined (Tr. 8-10B), and that consideration be given to such facts and explicit findings made thereon. The factual issue deemed controlling in that separate opinion is (332 U.S. at p. 730): "* * * whether the petitioner pleaded guilty in reliance on the palpably erroneous advice of an F.B.I. lawyer-agent who, as the symbol of the prosecu-

tion, owed it to an accused in petitioner's position to give her accurate guidance, if he gave any." The inquiry is two-fold, (1) whether the erroneous advice was in fact given, and (2) whether the advice, if given, induced petitioner's plea of guilty. The rather lengthy second hearing was addressed specifically to these questions of fact. Pertinent evidence adduced at both hearings is set forth below.

A. *Evidence adduced on the first hearing*

Petitioner, after testifying that she sent for Mr. Collard to explain the indictment, gave the following answers to the following questions (R. 55-56):

> Q. Now then—will you tell the conversation you had with Mr. Collard?
>
> A. I brought my indictment to the office, and assured Mr. Collard it was—I told Mr. Collard that he has taken my statement and he knew that I never was—I didn't do those things which are called "Over" Acts, and Mr. Collard explained to me that the indictment doesn't cover the charge, and I seemed not to be able to understand, so Mr. Collard explained the indictment to me by an example which he called the "Rum Runners."
>
> Q. Tell how he advised you and what he said.
>
> A. This is what I understood: That if there is a group of people in a "Rum" plan who violate the law, and another person is there

and the person doesn't know the people who are planning the violation and doesn't know what is going on, but still it seemed after two years this plan is carried out, in the law the man who was present becomes * * * the person nevertheless is guilty of conspiracy. And I said to Mr. Collard: "If that is the law in the United States, I don't know how I ever can prove myself innocent, and how will any judge know how am I guilty if this is the law?" Mr. Collard then told me about the Probation Department, of which I had not heard before, and he explained to me that it is the duty of this office—the Probation Department—to collect the proper data and to present it to the judge, so that the judge will know what to go by.

* * * * *

[R. 77-78] By Mr. KRONNER:

Q. Now, then, Mrs. von Moltke, how did Mr. Collard explain to you as to the nature of these charges? Did he attempt to explain just what these charges did mean?

A. No. Mr. Collard said that those charges don't mean a thing, and then he explained to make me see the Rum Runners' case. I told him, "Mr. Collard, you know I never introduced Mr. Abt to Mrs. Dennen (sic)." Then he explained the Rum Runners' case, and it gave me the idea that if such is the law in the United States, you can't do anything about it.

At another point, petitioner testified that she told Collard that, since he had taken her statement, he

knew that she was never in Grosse Point, where one of the overt acts naming her was alleged to have occurred, and that she had "nothing to do with all the people named here" (R. 64-65, 75-76). It was after these statements, she testified, that he gave her the rum runners' illustration (R. 76).

Collard testified that on October 2 he received a message that petitioner wanted to talk to him. When he visited petitioner she had a copy of the indictment and had circled the various "counts" that mentioned her. (R. 140, 142.) He talked with her for several hours and explained the nature of conspiracy to the best of his ability (R. 141-143). The following occurred on Collard's cross-examination (R. 142-144):

> Q. And did you during that discussion use an illustration about a rum runner?
>
> A. Well, I heard Mrs. von Moltke say that, and since she did I have been trying to recall, and I cannot remember such an illustration.
>
> Q. I see.
>
> A. But it is quite possible that Mrs. von Moltke's memory is better than mine, and I may have used such an illustration.
>
> * * * * *
>
> By Mr. FIELD:
>
> Q. Did Mrs. von Moltke ask you the difference, or to define the difference between a combination, a conspiracy, and a confederation?
>
> A. I am sure I don't know whether she asked me such a question or not.

Q. You don't recall that?

A. No, I don't believe I do.

Q. Did you discuss with Mrs. von Moltke whether she introduced one Edward Arndt to Grace Buchanan Deneen?

A. This is on the occasion of October 2?

Q. October 2, 1943.

A. I will have to answer that by saying that if that is one of the Overt acts involving Mrs. von Moltke, then I did discuss it with her.

Q. And did you explain to Mrs. von Moltke the nature of an Overt act?

A. Well, if she asked me, I probably tried to, but whether she asked me or not I just don't remember.

Q. And did Mrs. von Moltke ask you whether merely conferring with people who later turned out to be guilty of criminal acts would also make her a criminal, and guilty of criminal acts?

A. I do not just recall that particular question. It is quite possible.

Collard testified that he did not indicate to petitioner the course she should pursue (R. 144). He testified that he told her that the question of whether she should plead guilty "was a matter strictly for her, and for nobody else" (R. 137). He reaffirmed the statement he had made in opposition to petitioner's motion to withdraw her plea that the plea was "her free and voluntary act made after due consideration with a full and complete understanding of the charge made against her in the indictment in the instant case" (R. 146). He

said on the stand that "as far as I knew and could understand, she understood thoroughly what the whole thing was all about" (R. 147).

B. *Evidence Adduced on the Second Hearing*

1. *The conversation with Collard.*—Collard, the F.B.I. agent whose asserted advice was in issue, testified that on October 2 [17] petitioner had one of the matrons call his office and leave word that she would like to talk to him (Tr. 34-35). This occurred four days after she had indicated her desire to plead guilty, but had been dissuaded by her husband (Tr. 101-102, 367-368, 418-419). On October 2, Collard, accompanied by another agent, went to the jail and talked with petitioner in an office room. She had a copy of the indictment on which several overt acts pertaining to her were circled or otherwise marked, and she asked him to explain the indictment. (Tr. 34-36.) Petitioner's testimony at the first hearing, as to the explanation of the law of conspiracy assertedly given her by Collard, was read (Tr. 37-38). Collard was interrogated specifically about this advice as follows (Tr. 38-44):

> Q. Did you give her that advice?
>
> A. As a lawyer, I couldn't have given her that illustration of a rum runner.
>
> The COURT: Did you, or didn't you?

[17] Collard established this date, October 2, by his own records prepared in 1944 of cards indicating jail visits (Tr. 35, 534-536, 557-558). (See note 14, *supra*.)

By Mr. FORDELL:

Q. Did you give her an illustration?

The COURT: First begin with the illustration. Did you give her the illustration in the manner she has outlined you gave it to her, and if you did not, could she have arrived at that conclusion from anything you said?

A. No, sir.

By Mr. FORDELL:

Q. You do recall giving her an illustration, is that it?

A. I said at the other hearing it is quite possible I gave her an illustration concerning a rum runner's case, yes, sir, but not the illustration as she said in her testimony, no, sir.

Q. You are a lawyer?

A. Yes, sir.

Q. Admitted in what state?

A. States of Texas and Kansas.

Q. Are you practicing law at this present time?

A. No, I am not.

The COURT: The court would be interested, Mr. Fordell, in knowing what the illustration was he gave her, if he did give her one.

By Mr. FORDELL:

Q. Do you recall the illustration that you gave her?

A. To the best of my ability now, to remember, it is quite possible while talking to Mrs. von Moltke that I used an illustration of a rum runner's case to attempt to show the gen-

eral law of conspiracy. And to the best of my memory now, if I did use such case, I probably told her that where several people get together and decide among themselves to run rum across the Detroit River, and should subsequently one of those persons proceed to run some rum across the Detroit River, those persons who would be together originally agreeing to so run the rum would be guilty of a conspiracy.

* * * * *

The COURT: Would it have been possible for her, do you think, under the circumstances, being in jail, and apparently friendless, the nation she had come from at war with the United States—I think she came from Germany, did she not?

Mr. FORDELL: Yes, your Honor.

The COURT: Might it have been possible for her to have been in such state of mind as to not have understood the example that you gave?

A. I do not think so, your Honor, no, sir.

The COURT: She was not flustered or excited?

A. No, sir.

The COURT: She was there alone?

A. Another agent was with me.

The COURT: Who was the other agent?

A. Charles T. Hanaway.

The COURT: Of course, in giving any kind of illustration you didn't go into all the details and possibilities?

A. No.

The COURT: Are you sure that you made clear to her that she must have participated in the agreement?

A. Yes, sir.

The COURT: Or understanding.

A. Yes, sir.

The COURT: It didn't have to be in writing.

A. That is right, it doesn't have to be in writing.

The COURT: There is no question in your mind but what she understood what you were saying?

A. That is right, yes, sir.

The COURT: All right.

By Mr. FORDELL:

Q. How much time was devoted by you, or taken up at this meeting with her, when you gave this explanation of the law to her?

A. I believe the record reflects there that we were there about two and a half hours.

* * * * *

Q. You went over the overt acts?

A. Yes, sir.

Q. Do you recall what explanation you gave her with regard to the overt acts described in the indictment as they pertained to her?

A. I can't recall specifically, no, sir.

Q. In reading the record, do you recall the testimony of Mrs. von Moltke that you told her the indictment did not mean anything?

A. I remember reading that in the statement, yes, sir.

Q. Did you ever say that to her?

A. No, sir, I did not.

Q. I believe that she further stated that you told her the overt acts didn't mean anything.

A. Yes, sir, she stated that.

Q. Did you tell her that?

A. No, sir, I did not.

Collard further testified that he "undoubtedly tried to explain to her what is meant by the overt acts" (Tr. 59). On being asked whether he had any difficulty explaining the overt acts to petitioner he replied (Tr. 60) "To the best I remember, Mrs. von Moltke is very intelligent * * * and since she is, and I tried to explain it to the best of my knowledge, I don't know whether you would say we had difficulty or not." The court then questioned Collard as follows (Tr. 60-61):

The COURT: What was your impression? Did she seem to know what an overt act was?

A. Yes, sir.

* * * * *

The COURT: What did you say to her, in a general way, if you can remember?

A. As best I remember, I probably just told her the overt act was the actual carrying out. It is hard now to say what I said six years ago.

The COURT: You started to say what you thought you said to her.

A. Undoubtedly I tried to tell her it was an actual commission of some particular act, an actual doing of some particular thing.

On cross-examination, Collard testified (Tr. 78, 80):

Q. You stated on direct examination this morning that you believe you did discuss—and if I am wrong correct me, please—the five overt acts in which Mrs. von Moltke's name appears, with her?

A. I am sure that we did discuss those acts.

Q. Did you also in that connection discuss the legal implications of those acts?

A. No I did not try to discuss any legal implications with Mrs. von Moltke.

Q. You simply told her then that her name was mentioned in these overt acts, is that correct?

A. Tried to discuss them with her as they applied to her, yes, sir.

Q. And just how would that be, Mr. Collard? Would you elaborate on that thought a bit?

A. Of course, Mr. Field, it is very hard now to remember what we discussed.

* * * * *

Q. What was Mrs. von Moltke trying to find out?

A. She just wanted to discuss them, talk about them.

Q. What was the nature of the discussion?

A. What was the nature of the discussion?

Q. Yes, please.

A. Well, it concerned the indictment and other things.

Q. Did the discussion bear upon her ques-

tions, or a question in her own mind as to whether she was guilty or innocent of the charges made in the indictment?

A. I don't know what was in her mind concerning that, no, sir, but I think the record very well reflects that I told her very definitely, either at this occasion or some other time, that how she pled was strictly a matter for her and no one else.

Q. I believe you did testify in almost the exact language at the original hearing, did you not?

A. Yes, I very definitely told Mrs. von Moltke that, yes, sir.

Collard had been engaged in general private practice for 3½ years before joining the F.B.I. (Tr. 44-45). When petitioner sent for him, he did not know in advance what she wanted to talk about (Tr. 48). Although the ensuing conference lasted two and one-half hours, only a part of this time was spent in answering questions relating to the indictment (Tr. 44). Her questions had many ramifications and she called for many explanations (Tr. 44). Collard repeatedly asserted during the second hearing that he gave her no "advice" in the sense of recommending any course of action to her (Tr. 73, 98-99, 113). He did not recommend that she plead either guilty or not guilty (Tr. 87). In fact Collard told her that the question of how she should plead "was strictly a matter for her and no one else" (Tr. 80).

He did not act as a lawyer and simply tried to answer her questions (Tr. 93).

Collard testified on cross-examination (Tr. 101-102):

By Mr. Field:

Q. Your statement to Judge Picard that you believed that Mrs. von Moltke understood the indictment and the charges against her, is your interpretation of observations you were able to make in connection with conferences with Mrs. von Moltke from the time of her arrest until just before she pleaded guilty, is that correct?

A. The indictment was not returned until the 21st.

Q. I understand that.

A. So the remark, the answer to the question Judge Picard asked, that impression and the answer I gave him would have to have been based more on the October 2nd discussion than those prior, because prior there was no indictment. So the fact that I say to my knowledge she understood the indictment, that statement would have to be based upon the October 2nd discussion.

Q. Is it your position here in court now that she understood the indictment, you explained it to her?

A. No, sir.

Q. Not at all?

A. That wasn't the question Judge Picard asked, I don't believe, Mr. Field.

Q. Is it your position that she understood

the indictment and the charge against her because of the information you gave her about the indictment at the conference in the Sheriff's office in the Wayne County Jail, the matron's office in the Wayne County Jail on October 2nd, 1943?

The Court: Do you mean solely because of that?

Mr. Field: Yes, your Honor.

A. No, sir, definitely no, because Mrs. von Moltke came over here to plead guilty of her own volition on September 28, 1943, even prior to this conversation.

Relative to the question as to whether petitioner desired advice by legal counsel, the following question was asked Collard (Tr. 64):

Q. You don't remember Mrs. von Moltke telling you that the attorney that she was expecting to come to represent her had not appeared?

A. No, sir. As I remember it, Mrs. von Moltke kept telling me she didn't want an attorney.

Other witnesses had testified on the first hearing that on other occasions petitioner also disclaimed any desire to consult an attorney (R. 147-148, 153). When asked as to whether he had informed petitioner of her right to counsel, Collard stated (Tr. 108):

Q. And did you, in addition to telling Mrs. von Moltke that she had been technically

rearrested,[18] advise her that now she was entitled to the assistance of counsel under the Sixth Amendment to the United States Constitution?

A. I don't remember, Mr. Field.

Q. Would you say that you might have?

A. Yes, sir. I would say that I might have.

Collard had previously testified that he believed he explained to petitioner that if she could not afford an attorney, the court would appoint one (Tr. 43).

On the other hand, petitioner testified that Collard gave her the allegedly erroneous legal advice before September 28, i.e., before she had indicated to Hanaway and Babcock on September 28 that she wanted to plead guilty (Tr. 138, 160, 367, 376-377, 405-406). Relative to the conference with Collard petitioner testified (Tr. 138-141):

Q. What did you say to him.

A. I said that I couldn't understand the indictment because I read it over and over again and I saw that the overt acts were the same as we had discussed in the statement, and I knew by the date what was meant and what I was accused of. And Mr. Lehr, at the Enemy Alien hearing, had my statement, and he took out the same points, what you call overt acts, and questioned me on that, and every time they seemed to be satisfied. And then I got the indictment——

[18] Collard had testified at the prior hearing that he had told petitioner that technically she had been re-arrested on the indictment (R. 141).

Q. Did you tell Mr. Collard all this?

A. Yes. And I had the same accusations again. So, as Mr. Collard came and we went to the matron's office, I said, knowing Mr. Collard always was very honest, "Mr. Collard, do you think I have told the truth in my statement?" And Mr. Collard answered, "Yes, Mrs. von Moltke, we know you have told us the truth." And then I said: "How does it come that those five accusations are always appearing again? I am always questioned. You know that I didn't do those things from my statement." And then we went over it because I know what they all mean——

Mr. Field: I want to interrupt you, Mrs. von Moltke. You have a habit of answering more than the question I ask.

The Witness: Pardon me.

Mr. Field: I wish you would just answer the questions I ask you, please.

The Witness: All right.

By Mr. Field:

Q. The next question I would like to ask you is whether or not the overt acts that are mentioned in the indictment were discussed between you, Mr. Collard and Mr. Hanaway when you were examined for four days after your arrest on the Presidential warrant?

A. Yes.

Q. They were?

A. They were.

Q. And were these same overt acts mentioned at the Alien Enemy Board hearing?

A. Yes.

Q. And when you received the indictment and found these acts mentioned as overt acts, did you then discuss them with Mr. Collard?

A. Yes, for this reason. I called for Mr. Collard because I was certain—as I say, I couldn't understand the indictment. I mean, Mr. Field, that to my way of thinking I had explained those so-called overt acts, and Mr. Collard said he knew he had told the truth, I was not guilty of the accusations in there, and still I was indicted on those, and I wanted to know from him——

The Court: Excuse me. Did he say to you he knew you were not guilty?

A. No. He said I had told the truth.

* * * * *

Mr. Field: About these overt acts.

A. About these particular five overt acts.

Petitioner on direct examination gave the following testimony regarding the illustration that she contends Collard gave her (Tr. 153-154):

A. Mr. Collard then explained the nature of business of a rum runner, and he then brought that out and said if several people are in one room and plan violation of the law, to hijack rum, and another person enters the room, and they don't know—the person entering the room does not know the other people, he or she has never seen them, but happens to over listen their plan, and even after this plan is carried out, two years later, and the government becomes aware of the fact that the person at the time listening in to their

planning, the person is guilty of conspiracy under the American law. That it was I understood Mr. Collard explained to me. And that was the result to my statement if I knew Miss Buchanan Dineen, two hundred and fifty other people knew her too. That brought Mr. Collard up to show me that if a person, even if you have nothing to do with that person, only by being in a room, or listen to them, that under the American law you can become guilty of conspiracy.

On cross-examination she again was asked to give the illustration which she did, as follows (Tr. 406-408):

A. The illustration was that Mr. Collard explained to me the importance of the indictment, and that this was not the overt acts, that this was the conspiracy. And he explained to me conspiracy, because I didn't know what conspiracy was. And because I couldn't understand that, he gave me the illustration of the rum runners, and he said if there are some people in a room plotting a violation of the law, and another person is present, the person has never seen the others and doesn't know them, just happens to listen in to that conversation, and the person who is listening to the conversation has nothing to do with that at all, and the plot is not carried out right then, but even after two years, if the law is violated, as the people have planned to do, if then the government would become aware of the fact that the person who just overheard the thing was with

them in a room, then the person would be guilty too under the law. That is what I understood Mr. Collard's explanation, and we talked two and a half hours about the thing.

Q. Are you sure that Mr. Collard didn't say that if the third person is listening to what the other people say, and indicates that he agrees with the other two people on the things that they have decided to do, that that third person listening in might be guilty of conspiracy.

A. No. That is not what I understood Mr. Collard to say.

Q. You remember positively that he specifically emphasized the fact——

A. Yes.

Q. —that he didn't have to know these two people?

A. That is right.

Q. Or talk to them in any way whatsoever?

A. Yes.

Q. Just the mere fact he happened to be in that room?

A. Yes.

Q. And close enough to listen?

A. Yes.

Q. But not close enough to indicate that he was willing to go along with what these two people were discussing?

A. I don't remember that Mr. Collard went into that.

Q. You don't know whether he made that distinction to you?

A. No. What I remember that he said that if the person was in the room and they did not know each other, those people, the person just

happened to be in the room and would hear their conversation.

2. *Evidence bearing on petitioner's reliance on the statements attributed to Collard.* — Petitioner was examined at some length as to the bearing of these statements, attributed to Collard, on the situation in which she found herself.

Government counsel asked petitioner whether she had been in a room where people were planning to violate the law, and whether she heard conversation, as in the "rum runners" illustration, and she replied in the negative (Tr. 411-414). Government counsel then asked her the following questions and she gave the following answers (Tr. 414):

> Q. And you state that you had never heard anyone, either the defendants or anyone else, in any room, or any place, plan to violate a law, is that right?
>
> A. That is correct.
>
> Q. And how could you by any form of reasoning say to yourself, "Well, then the law makes me guilty if that is what the law is"?
>
> A. Mr. Fordell——
>
> Q. How could you say that?
>
> A. We talked two and a half hours about this point, and finally through the explanation, of other examples and through all the explanations, I had still the feeling that nobody could know, under the conditions, what was inside of me; that if that was the law, this law would make me guilty.

The Court then questioned her in similar vein and she gave similar answers (Tr. 414-416).

Later Government counsel questioned her again as to whether Collard's illustration had any similarity to her own case, as follows (Tr. 469-470):

> Q. What part of this statement did you have in mind in coming to the decision, or conclusion that the example of Mr. Collard applied to you?
>
> A. That I knew Miss Buchanan and that I knew Mrs. Behrens, that they were acquaintances of mine, and all the questions asked at the FBI I tried to answer.
>
> Q. In other words, just because you had admitted to the FBI that you knew Miss Dineen——
>
> A. Yes, sir.
>
> Q. —the example of Mr. Collard about two people talking with each other——
>
> A. Not two.
>
> Q. —or a group of people——
>
> A. Yes.
>
> Q. —a group of people planning to violate the law——
>
> A. Yes.
>
> Q. —would apply to you if you listened in on that plan?
>
> A. Yes. But I never had listened in on any plan.
>
> Q. But you had never listened in on any such plan?
>
> A. There was no such a thing.

Although petitioner admitted on the second hearing that she knew Countess Buchanan-Dineen, she denied (Tr. 200, 294-296) being cognizant of the fact that Dineen was an agent of a foreign government, despite her signed inconsistent statement (Ex. 1) and despite her inconsistent testimony before the Alien Enemy Hearing Board (Ex. 3) (See pp. 7-10, *supra*). On being confronted with her testimony before the Board that she had learned that fact, she said she did not remember so testifying (Tr. 296-297). Later she admitted that she had so testified (Tr. 297-301). Her counsel then conceded that she had learned from Mrs. Behrens, a co-defendant (Tr. 302), "that Miss Dineen was supposed to be" an Axis agent. She further testified as follows (Tr. 316-319):

> Q. So you want this court to understand that at no time, either before this party or after this party, did anyone ever tell you that Miss Dineen was an agent?
>
> A. No. Nobody said to me Miss Dineen was an agent. There was speculation about Miss Dineen.
>
> Q. I am just asking you if anybody told you?
>
> A. No.
>
> Q. Now, referring to the Government Exhibit 1 again, and I am reading from the eleventh page of that exhibit, the following language:
>
> "Mrs. Behrens, to remove all doubt as to Dineen's identity, mission, and compe-

tence as an Agent, and to cut short the discussion which was becoming embarrassing to Miss Dineen, stated, 'I can assure you that Grace is all right. She comes with the highest recommendations from Gyula and Sari, and that's enough for me; otherwise, do you think I would have taken our time to associate with her.' "

What did you mean in making that statement to the FBI that Mrs. Behrens assured you that she was all right in order to remove all doubt as to her competence as an agent.

A. I didn't make that statement. It was said that somebody had said the statement was made.

Q. Then am I to understand that the third paragraph on page 11 of Exhibit 1, which is a statement that you made to the FBI, is not true? I would like to have you look at the eleventh page of that statement.

A. I didn't read this statement.

Q. You mean that when you signed the Exhibit 1, on which you placed your initials on each page, and also made some corrections to which you also affixed your initials with the abbreviation O.K., that you did not read that statement?

A. Mr. Fordell——

Q. I am asking you please.

Mr. FIELD: Answer the question.

A. Yes, I read the statement.

Q. You read the statement?

A. Yes.

Q. Then why did you say you did not remember this statement, which is Exhibit 1 that you have in your hands?

A. I don't understand what you mean.

Q. Maybe I misunderstood you, Mrs. von Moltke. You said, "I did not read this statement."

A. I did not make the statement, I said.

Q. Oh, you did not make the statement?

A. I did not make the statement. I did not make no statement in that it was a question and answer, and this statement then was composed and dictated by Mr. Collard and I consented to it.

Q. But before you signed it, and before you put your initials on that Exhibit 1, the statement to the FBI, you admit that you read it?

A. I would read over the page there at the time.

Q. You would read every page?

A. I would read over a page as it was presented to me.

Q. As it was presented to you, and then you would put your initials on it?

A. Yes.

Q. Now, you state that you did not make the statement——

A. It seems to me——

Q. —contained in paragraph 3 on page 11 of that exhibit?

A. No. I did not make the statement, Mr. Fordell. That was discussed and someone dictated it and as I read it——

Q. I don't mean you typewrote the statement, or that you wrote it out.

A. Or that I phrased it. I did not phrase it.

Q. I ask you the question that before you signed Exhibit 1, and before you put your initials on it, you went over every page, didn't you?

A. I read the pages, yes.

Q. You read the pages. Now, in that statement there is on page 11, the third paragraph, language to the effect that Mrs. Behrens, to remove all doubt as to Dineen's identity, mission, and competence as an agent, assured you—this is in substance—that Miss Dineen was all right. Was that paragraph in there on that page at the time you initialed it?

A. That paragraph was in there probably. It is in there now.

Q. If it was there then, you admit that Mrs. Behrens explained to you that Miss Dineen was a competent agent?

A. I did not conceive that to be the case at the time this was written.

Q. What did you think the language "to remove all doubt as to her competence as an agent" means, Mrs. von Moltke?

A. I couldn't say what I understood at the time that statement was made.

Q. In other words, you signed it without understanding what the meaning of that language was?

A. In the conversation.

Q. Just answer the question.

A. All right, yes. Then I signed it.

Q. Just say yes.
A. Yes.

Later she testified that she thought the previous questions were framed to elicit whether she had heard "direct" statements as to whether Countess Dineen was an Axis spy (Tr. 462-466).

Petitioner admitted that in January 1943 she wrote a note to Count Lingen in Switzerland with instructions to Count Lingen to forward an enclosed letter, which Countess Dineen was to write (Tr. 335-339). Petitioner had been questioned about this "drop address" at the time of the Enemy Alien Hearing. At that time she testified that she had merely written Count Lingen's address on an envelope and that accidentally, by some unknown process, it had fallen into the hands of Countess Dineen (See Respondent's Ex. 3, p. 101). After her plea of guilty she told the United States Attorney she had given the address to Countess Dineen in order to enhance her husband's position with the superintendent of schools who was fond of Countess Dineen (Tr. 626-627).

Petitioner was also examined as to the reasons previously given by her for her change of plea. She testified that on September 28, she told agent Hanaway that she and Mrs. Leonhardt decided to plead guilty because they thought they were expected to cooperate (Tr. 367).

She testified that she talked with her husband on September 28 (Tr. 252, 380-382), and again on Oc-

tober 6, when he told her that Okrent, the lawyer, was busy but would try and come to see her (Tr. 258, 382), and that she promised she would wait before doing anything further (Tr. 380-382). As to her change of mind on October 7, she testified (Tr. 356-357):

> Q. Now, Mrs. von Moltke, I believe you stated that Mrs. Behrens had told you, while you were in the County Jail, that everybody had pled guilty, and that if you didn't plead guilty there was a possibility that your husband might be arrested?
>
> A. Yes.
>
> Q. That made you apprehensive?
>
> A. Yes.
>
> Q. And for that reason I believe you stated you requested to see Mr. Collard?
>
> A. Yes.
>
> Q. And that you asked Mr. Collard if that might be true?
>
> A. Yes.
>
> Q. And that Mr. Collard, I think you quote Mr. Collard as saying he could not give any information to you as to whether your husband was involved?
>
> A. He could not answer my question.
>
> Q. He could not answer your question?
>
> A. That is what Mr. Collard said.
>
> Q. And that because he answered your question in that manner, you felt that if you didn't plead guilty there was a danger that your husband might be arrested?
>
> A. That there must be some truth in it.
>
> Q. You are positive of that?

A. Yes.

Q. And I believe that in your petition filed in 1944, in August, you withdrew the plea of guilty, you stated in your affidavit that, I believe, that was one of your reasons why you pled guilty?

A. Yes.

Q. Is that right?

A. Yes.

Q. Because of what Mrs. Behrens had told you and because of the answer Mr. Collard gave you?

A. Yes.[19]

Collard denied this statement attributed to him by petitioner (Tr. 257).

United States Attorney Lehr testified that on June 30, 1944, when petitioner indicated to him that she wanted to change her plea back to not guilty, she stated that her reason for pleading guilty to the indictment was that she had been informed by Theresa Behrens that if she failed to plead guilty, her husband might be implicated in the affair (Tr. 650). In her affidavit to withdraw her plea she indicated that concern about involving her husband motivated her plea (R. 38-45).

Petitioner admitted that when she saw Assistant United States Attorney Babcock on September 28, 1943, she failed to tell him of the erroneous legal advice (Tr. 378). Nor did she tell United States Attorney Lehr in the successive interviews she had

[19] See also Tr. 254-258, 383.

with him between January and June 1944 that she had been induced to plead guilty because of erroneous advice (Tr. 635-636). When questioned as to why, at the time she moved to withdraw her plea, no mention was made of the fact that she had been induced to plead guilty on the basis of the "rum runners" example, she replied that she was not certain whether she told Mr. Okrent, her attorney, about the so-called "rum runners" example (Tr. 361-363; see also Tr. 357-361). She testified that she did not think at that time that what Collard had told her was important (Tr. 373).

IV

The New Findings

On July 19, 1949, the trial court again dismissed the petition for a writ of habeas corpus (Tr. 730). In a twenty-page opinion the trial court reviewed the evidence (Tr. 709-729). On the specific factual issue of the advice assertedly given by Collard, referred to it by this Court's mandate, it found as follows (Tr. 715-716):

> In any event, we are met squarely with the issue of credibility on this first question and after having heard the testimony and observed the demeanor of both the agent and Mrs. von Moltke on the stand, we have made our decision. The agent was a scrupulous witness, approaching in his honest detachment the ideal of a trained, disinterested observer. In fact his refusal to insist that he could remember the

exact words passing between himself and Mrs. von Moltke more than 5 years ago during her long period of incarceration is in striking contrast to her testimony where she remembers almost everything verbatim and in our opinion lends strength to his statements. As for Mrs. von Moltke we were as impressed as evidently Judge O'Brien was that she is an intelligent, mentally acute woman. We can add that she was also artful and resourceful. This impression was borne out by her conduct on the stand, her choice of words and her grammar. We noted also her vacillation, inconsistencies and contradictions. In our opinion she not only understood that she must overhear the plotters but in addition that she must have acquiesced and participated in the illegal scheme, and that some one of the plotters must have committed an overt act aimed to carry out the conspiracy.

We have no hesitancy in resolving the fact issues in favor of the agent. We believe him.

The trial court also found that petitioner was aware of her right to counsel (Tr. 716-719). The judge based this finding on the fact that at her arraignment and at the time she pleaded guilty, petitioner was informed of her rights; that petitioner told the agents she did not want an attorney; that her husband promised to send a lawyer to her; that her husband admitted he knew defendants were entitled to counsel and it strained credulity to believe he had not so informed his wife (Tr. 716-719).

The judge also found that petitioner was apprised of the fact that a death penalty was possible (Tr. 719-721). He pointed out that petitioner first said she had free access to the newspapers, but that, when confronted with newspaper accounts of September 17 and 18 mentioning the death penalty, she qualified this statement saying that she did not see any papers until she was placed in the Wayne County Jail on September 21. The court concluded (Tr. 720):

> We are convinced first, that this latest claim is an after-thought stimulated by observance in the Supreme Court's opinion that it didn't appear that she was directly informed concerning the penalty, and second, that this backwatering was self-serving to offset the turn that the testimony had taken. In any event Mrs. von Moltke did not receive the death penalty and she does not deny that she knew she was subject to some sentences.

As to petitioner's claim that she did not know of the presumption of innocence, the court found (Tr. 722):

> While we are handicapped, of course, in evaluating all the subjective elements leading to the plea, we conclude that her knowledge or ignorance of the presumption of innocence played no part in inducing her plea. Further, we cannot forbear from adding that while many Americans may not know that an accused person is "presumed to be innocent"

we are skeptical that one so obviously intelligent as petitioner, in the dilemma she found herself in, under all the surrounding circumstances, could be unaware of as basic a part of our democratic system as that presumption.

In conclusion the judge ruled (Tr. 727-729):

Granting that conspiracy is in a different category than other crimes and is more difficult to explain; it is also a crime where rules of evidence are more lax and many times is easier to prove or at least to ready a case for the jury. While we appreciate that every defendant should be informed of the essentials of the crime to which he is pleading guilty it would be impossible for a court to anticipate all possible contingencies a fertile imagination might later manufacture as to some possible feature of his rights that had not been fully explained to him. The court must believe the prisoner knows what he's doing. Judges Moinet, Lederle and O'Brien were all satisfied that Mrs. von Moltke knew what she was charged with and what her punishment might be. She pleaded guilty. Today she is still very resourceful. If either she or some other witness inadvertently gives adverse testimony Mrs. von Moltke quickly avoids the pitfalls. She even advances contentions she never dreamed of before but are suggested from a strained reading of the Supreme Court and other opinions not justified by those opinions. She seeks to negative her plea of guilty not by evidence of what induced her to plead but by taking advantage of statements by men who only testify

as to the things they actually do remember. Their consciences are not as elastic as Mrs. von Moltke's.

* * * * * .

We hold that Mrs. von Moltke not only has failed to meet the burden of proof but in our opinion pleaded guilty because she wanted to —with full knowledge of all her constitutional rights. Her present claims are but opportunities.

Therefore, it is our holding that the petition be dismissed and the writ discharged.

The judgment was affirmed on April 6, 1951, by the Court of Appeals for the Sixth Circuit (Tr. 752), Judge McAllister dissenting (189 F. 2d at pp. 61-76).

SUMMARY OF ARGUMENT

I

The cause was remanded for further hearings on the specific issue of whether petitioner had pleaded guilty in reliance on erroneous legal advice allegedly given her by F.B.I. agent Collard. The district court's finding that petitioner had not been given such advice and had not pleaded guilty in reliance thereon was based primarily on his determination of the issue of credibility posed by petitioner's testimony that Collard had given her erroneous advice, and Collard's denial that he had made the statements attributed to him by petitioner. This is the kind of issue that only the

trier of facts who sees and hears the witnesses can properly determine.

Insofar as the record does convey an impression as to credibility, it amply supports the conclusion of the district judge. Collard's disclaimer of recollection as to many details reveals no more than his scrupulous honesty. Petitioner's studied evasiveness and vacillation on numerous issues are also apparent. It is significant that two judges who saw and heard petitioner testify at length refused to credit her testimony.

Moreover independent circumstances support the conclusion that the alleged erroneous advice was not given, and that such explanation as Collard did give was not the decisive factor in petitioner's decision to plead guilty. It is on its face incredible that a lawyer would give the palpably erroneous advice which petitioner claims that Collard gave her, or that he would tell her the indictment did not mean anything. It is particularly incredible that Collard would have talked about complicity of one who merely overhears a plot when he had just taken petitioner's statement revealing that she had given to Countess Dineen, whom she knew to be a Nazi spy, an address and a note requesting the forwarding of a letter to the leader of the pro-German party in Hungary.

Moreover, four days before Collard's alleged legal advice, petitioner had decided to plead

guilty. And when, shortly after her plea of guilty, petitioner made a motion to withdraw it, and for that purpose consulted with a lawyer at least five times, she made no mention of the alleged improper legal advice although she did make other contentions based on her alleged conversations with Collard.

The burden was on petitioner to prove her allegations by a preponderance of the evidence. Aside from the fact that there is no basis for discrediting Collard's testimony, the district court was not obliged to credit petitioner's, particularly since the independent circumstances clearly establish that Collard's explanation of the indictment was not a determinative factor in her decision. This Court cannot reweigh the evidence and reappraise the credibility of witnesses.

II

As to petitioner's attempt to reargue the point directly in issue on the prior hearing, whether she intelligently and knowingly waived her right to counsel, the findings of the district court on the second hearing, as on the first, that petitioner had acted competently and intelligently, should be affirmed for the reasons set forth in the opinion of Mr. Justice Burton, concurred in by the Chief Justice and Justice Reed, 332 U.S. at pp. 731-741.

Such new evidence as was adduced on this issue at the second hearing gives further support to the

findings of the district court on both occasions. It now appears that not only on September 28th, when she first expressed her intention to plead guilty, but also on October 6th, the day before she pleaded guilty, petitioner's husband told her that Mr. Okrent was coming to see her again and requested her not to act without a lawyer. Okrent had not yet decided whether he would represent petitioner. Moreover, it appears that her husband knew that she was entitled to counsel, and, as the district judge found, it strains credulity to believe that he would not have so informed petitioner. The record is clear that petitioner was an intelligent, purposeful, strong-minded woman who was convinced that she could handle her affairs better than any lawyer. The finding of both district courts that she intelligently and competently waived counsel is fully supported by the evidence.

Issues as to whether petitioner knew of the possibility of a death sentence and was aware of the presumption of innocence are irrelevant. It is clear that there was never any real possibility that the death sentence would be imposed. The presumption of innocence is only one of many factors on which a lawyer may advise a client. The right to rely upon a plea of guilty would be rendered nugatory if it could be set aside just because a defendant may not have known a point of law that might be relevant to the case. Peti-

tioner was told by judge, prosecutor, agents, and the attorney sent by her husband not to plead guilty unless she felt guilty in her heart.

The findings of the district court on two occasions, each time affirmed by the Court of Appeals, that petitioner acted competently and intelligently when she waived her right to counsel and pleaded guilty are amply supported by the record and should be affirmed.

ARGUMENT

I

The Evidence Clearly Supports the Finding of the District Court That Petitioner Failed to Prove That She Pleaded Guilty in Reliance on Erroneous Advice of an F.B.I. Agent

The specific issue which was before the district court on the remand was to determine whether petitioner pleaded guilty in reliance on erroneous legal advice allegedly given her by F.B.I. agent Collard. The district court resolved that issue by finding that petitioner had not been given such advice and had not pleaded guilty on the basis thereof. We submit that that finding is clearly supported by the evidence.

A. *The credibility of the witnesses was a matter for the district court to determine.*—Basically the task of the district court was to resolve the issue of credibility posed by petitioner's testimony that Collard had told her that one who merely overhears a plot may be guilty if the plot is consum-

mated, and Collard's denial that he had made such a statement. This is peculiarly a matter which an appellate court, which does not see or hear the witness, cannot evaluate. No printed record can convey those aspects of expression and deportment on which a trier of facts must in large measure rely. It is for this reason that this Court has consistently held that, in habeas corpus cases as in all other cases, issues of credibility must be determined by the trier of facts. *Quicksall* v. *Michigan,* 339 U.S. 660, 666; *Wade* v. *Mayo,* 334 U.S. 672, 683-684; *Hawk* v. *Olson,* 326 U.S. 271, 279; see also *Banks* v. *Siegel,* 181 F. 2d 309, 310 (C.A. 4). It is significant that in this cause, two different district judges, who heard petitioner testify at length, refused to credit her testimony.

Much is made by the dissenting judge below of the fact that Collard, on this second hearing as on the first, admitted that he could not remember the details of his conversation with petitioner. We submit that on this matter the printed record bears out the finding of the district judge (see Statement, *supra*) that Collard's disclaimer of recollection reveals no more than his scrupulous honesty. He remembered general impressions—that he discussed the indictment and the overt acts with petitioner, that he could not have made the statement attributed to him, that petitioner talked a good deal and asked many questions, that she seemed to understand what the case was about. A few details had remained in his memory, such

as the fact that petitioner had circled or marked the overt acts which concerned her, and that he had told her the decision of how to plead was hers to make. That is how human memory normally operates. The finding that Collard was a credible witness, is, we submit, unassailable.[20]

On the other hand, the record, inadequate as it may be, does indicate why two different district judges refused to credit petitioner's testimony. While it is impossible to recapitulate the studied evasiveness that runs through her entire testimony or the vacillations that were evident to the district judge (see finding in Statement, *supra*), the cold record has preserved the contradictory character of much of her testimony. Her testimony at the second hearing as to her relationship with Grace Buchanan-Dineen. quoted at pp. 41-45 of the Statement, *supra,* is a good example of petitioner's apparent willingness to adapt her version of events to the needs which the occasion seemed to her to require. Numerous other inconsistencies appear throughout her testimony.

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[20] The implication in petitioner's brief, that the failure to call Hanaway, who was present with Collard at this October 2 conference, suggests that his testimony would be unfavorable, is unmerited. Hanaway had testified at the first hearing that Collard had explained the indictment to petitioner, but that he could not recall the illustration. (R. 129.) Although present at the second hearing, he was excused at his earnest request, without comment or objection from petitioner. (Tr. 157-159.) Apparently the United States Attorney decided that his recollection was not such that he would materially aid in the inquiry.

B. *Independent circumstances corroborate the finding that petitioner's plea was not induced by Collard's advice.*—Moreover, a number of independent circumstances tend to support the conclusion that the alleged erroneous advice was not given and that such explanation of the indictment as Collard did give was not the decisive factor in petitioner's decision to plead guilty.

a. It is first of all inherently incredible that any educated person, much less a lawyer, would give the palpably erroneous advice which petitioner claims that Collard gave her, and it is inherently incredible that an F.B.I. agent would tell a defendant that the indictment did not mean anything. Collard testified that, as a lawyer, he could not have given petitioner the example that she quoted, and we submit that his testimony in this respect carries conviction. Moreover, the inherent improbability of petitioner's testimony is greatly increased when it is recalled that Collard was one of the agents who had taken petitioner's statement in which petitioner had admitted that she had been told that Miss Dineen was an Axis agent and that she had given Miss Dineen an address in Switzerland and a note to be used for the purpose of forwarding a letter to the known leader of the pro-Germany party in Hungary. At both hearings, Collard was asked whether he questioned petitioner concerning the charges that were made in the indictment, and on

both occasions, he stated that he had not, that they had already taken her statement (R. 143; Tr. 76).

b. That Collard's explanation of the indictment was not the factor which influenced petitioner's plea is clear from the timetable of events. There can be no doubt that Collard's testimony that the conference took place on October 2, supported by official records kept at the time, must be credited over petitioner's testimony that the conference took place on September 27 or 28. Yet petitioner's husband testified that on September 28, when he dissuaded her from pleading guilty, petitioner told him that she saw no way out but to plead guilty. (Tr. 483.) This was the conclusion which she now claims she reached only after she had talked with Collard. The testimony of her husband, however, establishes that this was a conclusion which she had reached for herself prior to that time, and upon which she refrained from acting on September 28 solely because of her husband's insistence that she consult a lawyer.

c. Another circumstance that indicates that Collard's asserted explanation of the indictment was not a determinative factor in petitioner's plea of guilty is that at the time of her motion to change her plea her present contention was never raised. Lehr's testimony indicates that petitioner wished to change her plea, primarily, because the adverse effect on her husband's position was greater than

she had anticipated, and that despite her efforts to cut down the implications in her statement to the F.B.I. she came to the conclusion that she could not do so. (See Statement, *supra*, p. 18.) It is very significant that, although Mr. Okrent, who represented petitioner on the motion to withdraw the plea, conferred with her at least five times before the motion was filed (Tr. 537), no mention of Collard's alleged erroneous legal advice was made in the extended affidavit which was filed in support of the motion. The affidavit stressed primarily that petitioner's plea of guilty was induced by fear that her husband would be implicated. Petitioner also alleged that she "was told repeatedly that her refusal to plead guilty would result in her being the only person to go on trial, with the attendant newspaper publicity that such a trial would necessarily entail" (R. 40).[21] In the affidavit petitioner mentioned several conversations with Collard and other F.B.I. agents and stated that she called to their attention that if "she pleaded guilty the Judge would not know how lightly she was implicated in the matter, if at all, and that if she was guilty at all it was because she had committed an error in judgment" (R. 41); yet she never mentioned the circumstance, on which she now relies, of the asserted erroneous advice that she was guilty

[21] Compare the present attempt to suggest that petitioner did not know she would be entitled to a trial if she did not plead guilty (Br. 33-34).

if she merely overheard a plot. The trial judge was wholly justified in remarking of this circumstance (Tr. 362):

> She may have told him [Mr. Okrent, her lawyer]. There may have been some reason why he left it out, I don't know, but certainly if it isn't in there, it is very material that on one occasion she says that the reason she pled guilty was because she was misinformed as to her rights, and on another occasion she pleads guilty because she was afraid if she didn't plead guilty her husband might become involved. That is two entirelty different reasons.

C. *Petitioner failed to sustain the burden of proving that her plea was induced by the alleged erroneous advice.*—The conclusion of the dissenting judge below that the District Court's findings on this issue should be overruled was reached by a process of reasoning which is contrary to established law on the burden of proof in a habeas corpus proceeding. Finding Collard's testimony insufficient, he assumed that petitioner's testimony must be given full credence, and that it was then for the Government to negate that testimony by substantial evidence. That, however, is not the law.

In a habeas corpus proceeding, the petitioner has the burden of sustaining the allegations by a preponderance of evidence. *Adams* v. *United States ex rel. McCann,* 317 U.S. 269, 281; *Walker* v. *Johnston,* 312 U.S. 275, 286; *Johnston* v. *Zerbst,* 304 U.S. 458, 469. Aside from the fact that, as we have

shown, there is no basis for discrediting Collard's testimony, the District Court was not required to credit petitioner's testimony.

This Court has held that even the uncontradicted evidence of a petitioner on habeas corpus need not be accepted as true, and that the question is one of credibility for the trier of facts. *Hawk v. Olson,* 326 U.S. 271, 279; see also *Harpin* v. *Johnson,* 109 F. 2d 434, 435 (C.A. 9), certiorari denied, 310 U.S. 624; *Albert ex rel. Buice* v. *Patterson,* 155 F. 2d 429, 432 (C.A. 1), certiorari denied, 329 U.S. 739; *Farrell* v. *Lanagan,* 166 F. 2d 845 (C.A. 1), certiorari denied, 319 U.S. 776; *Ex parte Farrell,* 189 F. 2d 540, 545 (C.A. 1). Thus, in *Farrell* v. *Lanagan, supra,* the Court of Appeals for the First Circuit said (p. 847-848):

> No doubt there may be cases in which it would be clearly erroneous not to believe uncontradicted testimony. But so many factors affect credibility that it is hard to conceive of a situation in which we could say that it was clearly erroneous for a trial court to disbelieve, or find insufficient, oral testimony, even if uncontradicted, given with respect to a basic issue by a party having the burden of persuasion.

Accordingly, even if Collard had had no recollection of the alleged conversation, the District Court, finding on the basis of ample evidence in the record that petitioner was not a reliable witness, could have refused to credit her testimony and thus could have held that she had not met the

burden of proof imposed on her. Such a finding would be particularly appropriate in this case because, as we have shown, the independent circumstances clearly established that Collard's explanation of the indictment was not a determinative factor in petitioner's decision to waive counsel and plead guilty.

A specific finding of fact was made by the trial court that petitioner did not plead guilty in reliance on erroneous legal advice. This finding is documented by references to the lengthy transcript of the second hearing where that point was the specific issue litigated. This Court is not in a position to reweigh the evidence, and reappraise the credibility of witnesses. Cf. *District of Columbia* v. *Pace*, 320 U.S. 698, 701-702. The finding of the District Court, amply supported by the record, should be sustained.

II

Petitioner Has Failed to Sustain the Burden of Proving That She Did Not Competently and Intelligently Waive Her Right to Counsel

Petitioner has also reargued the point directly in issue on the prior hearing as to whether she intelligently and knowingly waived her right to counsel. While the District judge, after the second hearing, did make findings on this subject and the subsidiary questions related thereto—petitioner's knowledge of a possible death penalty and of the presumption of innocence—the evidence at the sec-

ond hearing was not primarily directed to these issues. Most of the testimony which directly bears thereon was given at the first hearing. For the reasons set forth in the opinion of Mr. Justice Burton, concurred in by the Chief Justice and Justice Reed, 332 U.S. at pp. 731-741, we submit that the District Court was fully justified in finding that petitioner had failed to sustain her contention.

Such new evidence as was adduced on this issue at the second hearing gives further support to the findings of the District Court on both occasions that petitioner knowingly waived her right to counsel. It now appears that not only on September 28, when she conferred with Assistant United States Attorney Babcock, but also on October 6, the day before she pleaded guilty, the day after she was allegedly frightened by Collard's refusal to tell her whether there was any basis for the rumor that her husband would be implicated, petitioner's husband told her not to plead guilty without consulting an attorney and that Okrent had promised to talk with her again as soon as he was less busy (Tr. 258, 382). Okrent had not refused to represent her before her plea was entered. It also appears that her husband knew she was entitled to counsel (Tr. 489-493), and, as the judge found, it strains credulity to believe he had not so informed her. Yet, following her September 28 conference with the Assistant United States Attorney, when Agent Kirby told her that the matter of the plea "would be a question for her

to decide, or her attorney, as we had understood from Mrs. von Moltke that Mr. von Moltke was interested in obtaining an attorney for her," petitioner "jerked her shoulders, and said she was not interested; that she wanted to make up her own mind" (R. 131-132). Collard testified as to the October 2 conference that petitioner "kept telling me she didn't want an attorney" (Tr. 64). And on the very day she pleaded guilty, the day after her husband had again told her Okrent was coming to see her, the agents asked her whether she had consulted a lawyer (R. 63). In all her discussions with the agents, in her bargaining with the United States Attorney on September 28, in her appearance to plead, when by her own admission the judge demurred at accepting her plea without an attorney, one question petitioner never seemed to have asked was what she could do about getting a lawyer, although admittedly she had been told that a lawyer would be appointed.

The determination of whether there has been an intelligent waiver of constitutional rights depends upon the particular facts and circumstances surrounding the particular case, including the background, experience, and conduct of the accused. *Johnston* v. *Zerbst, supra* (304 U.S. 458, 464); *Moore* v. *Hudspeth,* 110 F. 2d 386, 388 (C.A. 10), certiorari denied, 310 U.S. 643. The resolution of this question is peculiarly one for the trier of facts. There are some individuals who by reason of age,

ignorance or mental capacity, are incapable of representing themselves adequately in a prosecution. This incapacity is purely personal and can be determined only by an examination and observation of the individual. *Wade* v. *Mayo*, 334 U.S. 672, 684.

Here, both judges who heard petitioner were impressed by her obvious intelligence and acuteness. There is nothing in the record to suggest that she was not capable of exercising that intelligence and acuteness when she decided to plead guilty. The picture drawn by the dissenting judge below as to the circumstances surrounding her arrest on a presidential warrant is contradicted by the record. The F.B.I. log produced in evidence records the meticulous concern for petitioner's welfare during the period of questioning. It shows that, before she answered questions, petitioner asked to see the warrant for her arrest and read it. It shows that the questioning was leisurely, that petitioner was given every opportunity to correct her statement, and that she did make changes. It shows that messages were conveyed to her husband and articles he brought delivered to her. In general, it shows considerate treatment of an enemy alien, suspected of being a spy in wartime.

So also, petitioner's actions while detained after arraignment show that neither her intelligence nor her determination were at all affected. The record

as a whole conveys the picture of an intelligent, purposeful, strong-minded woman who was convinced that she could handle her affairs better than any lawyer. Only after her expectations as to the consequences of a conviction were not wholly fulfilled [22] did she try to convey the idea that she did not know what she was doing when she pleaded guilty. We submit that the district judge was clearly justified in finding, as the other judge who heard petitioner had found, that petitioner "was aware of her right to counsel, which we hold was intelligently and competently waived before Judge Lederle when she pleaded guilty" (Tr. 719).

The question of whether petitioner knew of a possible death penalty is irrelevant. As the opinion of Mr. Justice Burton states, 332 U.S. at p. 740:

> * * * The fact that the charge against her was under the Espionage Act and therefore carried a technical possibility of the death penalty did not at any time introduce a practical consideration that she was in actual danger of suffering capital punishment. She accurately forecast the general character of her sentence and was concerned primarily with the wish that her sentence be served near her family. An assistant district attorney stated

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[22] Lehr testified that when petitioner first talked about changing her plea, she stated he was concerned about the effect her plea had had on her husband's position (see Statement, *supra*, p. 17). The petition for habeas corpus was filed after deportation proceedings were instituted. 332 U.S. at p. 736.

that he would write a letter recommending that she be imprisoned close to her family.

It is clear that the Government never contemplated seeking the death penalty for petitioner and that there was no likelihood that it would be imposed. It would be artificial now to inject that factor into this case.

As to her assertion that she was unaware of the presumption of innocence, we submit that this, too, is without special significance. Advice regarding this presumption is but one of the many kinds of advice a lawyer may be expected to give his client, and the evidence overwhelmingly established that petitioner freely and intelligently waived her right to counsel. The right of the Government and the courts to rely on a free and intelligent waiver of the right to counsel would obviously be illusory if every defendant who made such a waiver and was thereafter convicted, whether on a plea of guilty or otherwise, could then revoke his waiver and secure a new trial on the ground that he would have adopted different tactics if he had known something that an attorney might have told him. The evidence establishes conclusively that the judge who accepted her plea (R. 68, 107-108, 133), the Assistant United States Attorney (R. 158-159), an F.B.I. agent (R. 122), and the lawyers sent by her husband (R. 120), all told petitioner to plead guilty only if she were guilty and not to enter such a plea if she thought she was innocent.

Petitioner's motion to vacate sentence shows clearly that she understood that if she did not plead guilty she would be entitled to a trial; in fact she there stated that the fear of publicity if she stood trial motivated her plea. The present contention that she did not know she was entitled to a trial (Br. 33-34) is clearly a new version developed for the purposes of this latest hearing.

Too much can be made of the alleged complexities of a conspiracy charge. Granted that there are many problems that a competent lawyer might wish to consider, it is still true that no intelligent person would have difficulty in understanding the purport of the indictment in this case. The nature of the conspiracy (R. 20-25) is simply stated and makes very clear that the defendants are charged with having planned to transmit to the German government documents, photographs, blue prints and other information relating to the national defense; that various addresses in neutral countries in Europe, including Count Lingen, were to be used to get information to persons in Axis-dominated countries. We submit that a woman of petitioner's intelligence would have no difficulty in knowing whether or not she had participated in such a plan. As this Court said in *Adams* v. *United States ex rel. McCann,* 317 U.S. 269, 276-277:

> * * * A plea of guilt expresses the defendant's belief that his acts were proscribed by

law and that he cannot successfully be defended. It is true, of course, that guilt under § 215 of the Criminal Code, which makes it a crime to use the mails to defraud, depends upon answers to questions of law raised by application of the statute to particular facts. It is equally true that prosecutions under other provisions of the Criminal Code may raise even more difficult and complex questions of law. But such questions are no less absent when a man pleads guilty than when he resists an accusation of crime. And not even now is it suggested that a layman cannot plead guilty unless he has the opinion of a lawyer on the questions of law that might arise if he did not admit his guilt. Plainly, the engrafting of such a requirement upon the Constitution would be a gratuitous dislocation of the processes of justice.

* * * If a layman is to be precluded from defending himself because the Constitution is said to make him helpless without a lawyer's assistance on questions of law which abstractly underlie all federal criminal prosecutions, it ought not to matter whether the decision he is called upon to make is that of pleading guilty or of waiving a particular mode of trial. Every conviction, including the considerable number based upon pleas of guilty, presupposes at least a tacit disposition of the legal questions involved.

On the issue of petitioner's intelligent waiver of counsel, two District judges have found in the present proceeding that petitioner competently and

intelligently waived her rights. Those judgments have in each instance been affirmed by the Court of Appeals. We submit that these findings were correct and should be affirmed.

CONCLUSION

The findings of the District Court, which involve determination of issues of credibility, are fully supported by the record. It is therefore respectfully submitted that the judgment should be affirmed.

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No. 78. VON MOLTKE *v.* GILLIES, SUPERINTENDENT. Certiorari, 342 U. S. 810, to the United States Court of Appeals for the Sixth Circuit. Argued January 28, 1952. Decided April 21, 1952. *Per Curiam:* Judgment affirmed by an equally divided Court. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *G. Leslie Field*, acting under appointment by the Court, argued the cause and filed a brief for petitioner. *Beatrice Rosenberg* argued the cause for respondent. With her

on the brief were *Solicitor General Perlman* and *Assistant Attorney General McInerney*. Reported below: 189 F. 2d 56.